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Jean C. Love
Santa Clara University School of Law, jlove@scu.edu

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JEAN C. LOVE*

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*B.A. 1965, J.D. 1968, University of Wisconsin; Professor of Law, University of California, Davis.

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I. INTRODUCTION

Prior to 1975, the courts uniformly refused to permit recovery at common law for the loss of either an injured child's[1] or parent's[2] society and companionship,[3] although legislatures in three states had enacted

[1]*E.g.*, Birmingham Ry. Light & Power Co. v. Baker, 161 Ala. 135, 49 So. 755 (1909) (collecting cases expressly denying recovery for "loss of companionship and association"); Smith v. Richardson, 277 Ala. 389, 171 So. 2d 96 (1965); Jackiewicz v. United Illuminating Co., 106 Conn. 310, 138 A. 151 (1927); Wilkie v. Roberts, 91 Fla. 1064, 109 So. 225 (1926); Sperier v. Ott, 116 La. 1087, 41 So. 323 (1906) (denying recovery for "mental suffering"); Butler v. Chrestman, 264 So. 2d 812 (Miss. 1972); Gilbert v. Stanton Brewery, Inc., 295 N.Y. 270, 67 N.E.2d 155 (1946); White v. City of New York, 37 App. Div. 2d 603, 322 N.Y.S.2d 920 (1971); Foti v. Quittel, 19 App. Div. 2d 635, 241 N.Y.S.2d 15 (1963); Quinn v. City of Pittsburgh, 243 Pa. 521, 90 A. 353 (1914); McGarr v. National & Providence Worsted Mills, 24 R.I. 461, 53 A. 320 (1902); RESTATEMENT OF TORTS § 703 (1938); Annot., 32 A.L.R.2d 1060 (1953); Annot., 37 A.L.R. 11 (1925). *But see* Stephens v. Weigel, 336 Ill. App. 36, 82 N.E.2d 697 (1948) (verdict awarding damages for "the loss of the services and society of his wife and daughter" affirmed without discussion); Bias v. Ausbury, 369 Mich. 378, 120 N.W.2d 233 (1963) (actions by mother and father for various losses sustained because of injury to son, including "deprivation of the son's 'normal' companionship"; court ordered new trial on issue of damages).

The law in Florida is in a state of confusion. In Wilkie v. Roberts, 91 Fla. 1064, 109 So. 225 (1926), the court ordered a new trial in an action for the lost services of an injured ten year old boy on the ground that the $2,500 verdict was excessive and directed the plaintiff-father to introduce evidence of the services actually rendered by his son. In Yordon v. Savage, 279 So. 2d 844, 846 (Fla. 1973), the court stated in dictum that *Wilkie* authorized recovery for "the loss of the child's companionship, society, and services . . . ," and held that either or both parents could sue for such damages. But, other Florida cases have construed *Wilkie* to limit the damages recoverable to compensation for lost services. *See, e.g.*, Youngblood v. Taylor, 89 So. 2d 503 (Fla. 1956); City Stores Co. v. Langer, 308 So. 2d 621 (Fla. App. 1975).

[2]Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471 (D.C. Cir. 1958); Early v. United States, 474 F.2d 756 (9th Cir. 1973) (applying law of Alaska); Meredith v. Scruggs, 244 F.2d 604 (9th Cir. 1957), *rev'g* 134 F. Supp. 868 (D. Hawaii 1955) (applying law of Hawaii); Turner v. Atlantic Coast Line R.R., 159 F. Supp. 590 (N.D. Ga. 1958) (applying law of South Carolina); Hill v. Sibley Mem. Hosp., 108 F. Supp. 739 (D.D.C. 1952); Jeune v. Del E. Webb Const. Co., 77 Ariz. 226, 269 P.2d 723 (1954); Halberg v. Young, 41 Hawaii 634, 59 A.L.R.2d 445 (1957); Hankins v. Derby, 211 N.W.2d 581 (Iowa 1973); Hoffman v. Dautel, 189 Kan. 165, 368 P.2d 57 (1962); Sabatier v. Travelers Ins., 184 So. 2d 594 (La. App. 1966) (denying recovery for "mental suffering"); Hayrynen v. White Pine Copper Co., 9 Mich. App. 452, 157 N.W.2d 502 (1968); Eschenbach v. Benjamin, 195 Minn. 378, 263 N.W. 154 (1935); General Elec. Co. v. Bush, 88 Nev. 360, 498 P.2d 366 (1972); Russell v. Salem Transp. Co., 61 N.J. 502, 295 A.2d 862 (1972); Duhan v. Milanowski, 75 Misc. 2d 1078, 348 N.Y.S.2d. 696 (Sup. Ct. 1973); Gibson v. Johnston, 75 Ohio L. Abs. 413, 144 N.E.2d 310 (1956); Erhardt v. Havens, Inc., 52 Wash. 2d 103, 330 P.2d 1010 (1958); RESTATEMENT (SECOND) OF TORTS § 707A (Tent. Draft No. 14, 1969); Annot., 59 A.L.R.2d 454 (1958).

[3]"Society and companionship" is a term of art that encompasses the intangible qualities of the parent-child relationship. For a fuller discussion of the nature of the interest protected in an action for lost society and companionship, see section 3A *infra*.

For a discussion of the common law governing the loss of an injured parent's or child's society and companionship, *see* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 10.6 (1968) [hereinafter cited as H. CLARK]; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 125 (4th ed. 1971) [hereinafter cited as W. PROSSER]; Lewis, Jr., *Three New Causes of Action? A Study of the Family Relationship*, 20 MO. L. REV. 107 (1955); Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61 COLUM. L. REV. 1341, 1346-47, 1357 n.95 (1961); Note, *Consortium . . . Child's Right to Recover for*

statutes permitting a parent to recover for the loss of an injured child's society and companionship.[4] Then, in *Shockley v. Prier*,[5] the Wisconsin Supreme Court held that the parents of an infant who had been permanently blinded and disfigured could bring an action against the defendant-physicians for the loss of the injured child's aid, comfort, society, and companionship. The court observed that Wisconsin's wrongful death statute "already recognizes the loss of society and companionship as an element of damages in the case of death,"[6] and concluded that it seemed "reasonable to recognize this same type loss where there has been injury to a minor child."[7] Two weeks later, in *Hair v. County of Monterey*,[8] an intermediate appellate court in California took the same position by way of dictum. The court noted the holding in *Rodriguez v. Bethlehem Steel Corp.*[9] that both spouses could recover for loss of consortium. It then expressed its opinion that "no reasonable distinction can be drawn between the right of parents, in appropriate circumstances, to seek recovery for lost comfort, society and companionship of an injured and

Negligent Interference with Parent-Child Relationship, 4 IND. L. FORUM 552 (1971); Note, *The Child's Claim for Loss of Consortium Damages: A Logical and Sympathetic Appeal*, 13 S.D. L. REV. 231 (1975); 54 MICH. L. REV. 1023 (1956); annot., 69 A.L.R.3d 528 (1976); Annot., 69 A.L.R.3d 553 (1976).

[4]Iowa and Washington have statutes expressly allowing recovery. IOWA CODE ANN. RULE CIV. PRO. 8 (Supp. 1974); WASH. REV. CODE ANN. § 4.24.010 (Supp. 1975). Idaho's statute, permitting parents to maintain an action for the injury of a minor child and authorizing the recovery of "such damages . . . as under all the circumstances of the case may be just," has been construed to allow recovery for the loss of the child's society and companionship. IDAHO CODE ANN. §§ 5-310 to -311 (Supp. 1975); Hayward v. Yost, 72 Idaho 415, 242 P.2d 971 (1952). Other jurisdictions have statutes comparable to Idaho's, but have not yet determined whether to construe them to allow recovery for lost society and companionship. *See, e.g.*, UTAH CODE ANN. §§ 78-11-6 to -7 (1953). *See also* Commercial Union Ins. Co. v. Rivera, 358 F.2d 480 (1st Cir. 1966) (applying Puerto Rico's general liability statute, P.R. LAWS ANN. tit. 31, § 5141 (1968), which has been construed to allow recovery for mental suffering sustained as a result of injury to either a parent or a child).

[5]66 Wis. 2d 394, 225 N.W.2d 495 (1975), *overruling* Callies v. Reliance Laundry Co., 188 Wis. 376, 206 N.W. 198 (1925). For a discussion of his case, *see* Comment, Children: Chattels to Chums—Shockley v. Prior, 59 Marq. L. Rev. 169 (1976).

[6]*Id.* at 396, 225 N.W.2d. at 499. The Wisconsin wrongful death statute provides:

> Judgment for damages for pecuniary injury from wrongful death, and additional damages not to exceed $5,000 for loss of society and companionship, may be awarded to the spouse, unemancipated or dependent children, or parents of the deceased.

WIS. STAT. ANN. § 895.04(4) (Supp. 1974).

[7]*Id.* at 400, 225 N.W.2d at 499.

[8]45 Cal. App. 3d 538, 119 Cal. Rptr. 639 (1975) (hearing denied by California supreme court on April 24, 1975) (action by parents for the loss of a permanently disabled child's society and companionship). *See also* Drayton v. Jiffee Chem. Corp., 395 F. Supp. 1081, 1097 (N.D. Ohio, 1975) (allowing mother to recover $100,000 for the "loss of a daughter's services and society," without discussion).

[9]12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974). In *Rodriguez*, the court was asked to deny the wife's action because other persons having a close relationship to the one injured (such as a parent or child) might seek to enforce similar claims. The court responded: "That the law might be urged to move too far . . . is an unacceptable excuse for not moving at all." *Id.* at 404, 525 P.2d at 683, 115 Cal. Rptr. at 779.

totally helpless child and the right of a spouse, in similar circumstances, to seek recovery for loss of consortium . . . ."[10] The court denied recovery to the plaintiffs, however, because their son's cause of action did not come within the class of cases to which *Rodriguez* applied retroactively.[11] The plaintiff's petition for a hearing before the California supreme court was denied.[12]

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[10]45 Cal. App. 3d 538, 545, 119 Cal. Rptr. 639, 644 (1975).

[11]In *Rodriguez*, the court held that "for reasons of fairness and sound administration a spouse will not be permitted to initiate an action for loss of consortium—even though not barred by the statute of limitations—when the action of the other spouse for the negligent or intentional injury giving rise to such loss was concluded by settlement or judgment prior to the effective date of this decision." 12 Cal. 3d at 408, 525 P.2d at 686, 115 Cal. Rptr. at 782. In *Hair*, the court concluded that this limitation on the retroactive application of the right of action for loss of consortium was also applicable to an action for loss of society and companionship, and therefore held that "parents may not maintain a cause of action for lost comfort, society and companionship of their child if the child's claim has proceeded to settlement or judgment before the effective date of the decision in the case of Rodriguez v. Bethlehem Steel Corp. . . . ." 45 Cal. App. 3d at 547, 119 Cal. Rptr. at 645. *Rodriguez* was decided on August 21, 1974, at which time the judgment in favor of the injured child in *Hair* had become final. *Id.*

[12]On May 22, 1975 (one month after the denial of the petition for hearing in *Hair*), the California supreme court denied the plaintiff's petition for hearing in Suter v. Leonard, 45 Cal. App. 3d 744, 120 Cal. Rptr. 110 (1975), with Justices Mosk (author of the court's opinion in *Rodriguez*) and Sullivan dissenting. In *Suter*, the court held that the minor daughter of a woman who had been severely injured in an automobile accident failed to state a cause of action for the loss of her mother's "society, care, protection, support and affection." *Id.* at 745, 120 Cal. Rptr. at 111. The Second District Court of Appeal in *Suter* made no reference to the First District Court of Appeal's decision in *Hair*, probably because *Hair* was decided on February 25, 1975, while *Suter* was handed down on March 5, 1975. Since the daughter's cause of action had been joined with her mother's action for personal injuries, and since the mother's case was still pending trial, *Suter* came within the class of cases to which *Rodriguez* would have applied retroactively according to *Hair*. *See* note 11 *supra*. The court of appeal's decision in *Suter* thus stands as a categorical refusal to recognize a child's cause of action for the loss of a parent's society and companionship.

The supreme court's denial of a hearing in both *Hair* and *Suter* leaves the law of California somewhat uncertain. The uncertainty is compounded by the conflicting doctrines regarding the precedential impact of a denial of hearing on 1) the supreme court, and 2) the courts of appeal. The supreme court is not bound by its denial of a hearing in a case presenting a question of first impression. *See* People v. Davis, 147 Cal. 346, 350, 81 P. 718, 720 (1905). On occasion, the supreme court has disapproved a prior court of appeal's decision within one or two years of denying a petition for hearing. *E.g.*, Estate of Rattray, 13 Cal. 2d 702, 715-16, 91 P.2d 1042, 1049-50 (1939); People v. Rabe, 202 Cal. 409, 418-19, 261 P. 303, 307 (1927); Bohn v. Bohn, 164 Cal. 532, 537-38, 129 P. 981, 983-84 (1913). Thus the only definite inference that can be drawn from the supreme court's refusal to grant a hearing in *Hair* and *Suter* is that the court was not yet ready to determine whether to allow recovery for the loss of an injured parent's or child's society and companionship.

Until the supreme court decides this question, what law will be applied by the lower courts? The courts of appeal are bound by the decision of another intermediate appellate court in a case of first impression once a petition for hearing has been denied, according to Cole v. Rush, 45 Cal. 2d 345, 351, 289 P.2d 450, 453 (1955), *overruled on other grounds by* Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971). For citations to numerous cases that have complied with the *Cole v. Rush* directive, see 6 B. WITKIN, CALIFORNIA PROCEDURE PART I, § 669, at 4582-83 (2d ed. 1971). Thus two options are open to lower courts that adhere to the *Cole v. Rush* directive. They can look at the

These two cases suggest that the time has come to question the common law rule. Why should the courts deny recovery for the partial loss of the ability of parents and children to function in a normal, mutually supportive relationship with each other? Have the courts refused to compensate this loss because it is an intangible one? If so, what distinguishes this loss from other intangible losses for which tort damages are recoverable? Given the fundamental importance of the parent-child relationship, what justification can be advanced for failing to accord it the same type of legal protection that the marital relationship receives through the action for loss of consortium? Similarly, once the legislature has authorized the recovery of wrongful death damages for a

result in both *Hair* and *Suter* and refuse to recognize any action for lost society and companionship in California. Or they can distinguish the two cases on the ground that *Hair* was an action brought by parents, whereas *Suter* was an action brought by a child. Although this distinction may be both illogical and constitutionally suspect, it is currently recognized in at least two jurisdictions. *Compare* IOWA CODE ANN. Rule Civ. Pro. 8 (Supp. 1974) (allowing recovery by parent) *with* Hankins v. Derby, 211 N.W.2d 581 (Iowa 1973) (denying recovery by child); *compare* WASH. REV. CODE ANN. § 4.24.010 (Supp. 1975) (allowing recovery by parent) *with* Erhardt v. Havens, Inc., 53 Wash. 2d 103, 330 P.2d 1010 (1958) (denying recovery by child). Should the California courts of appeal decide to draw such a distinction, *Suter* will require them to deny recovery in an action brought by a child. But in a parent's suit, they will be able to limit *Hair* to its holding that a cause of action for the loss of a child's society and companionship is barred if the child's claim for personal injuries has proceeded to settlement or judgment prior to the effective date of the decision in *Rodriguez*. They will then have to resolve the question of whether California should recognize a cause of action for the loss of an injured child's society and companionship.

If the courts of appeal do not follow the *Cole v. Rush* directive, they will be free to allow or disallow recovery, except for the First and Second District Courts of Appeal, which can be expected to follow their own decisions in *Hair* and *Suter*, respectively. Garza v. Kantor, 54 Cal. App. 3d 1025, 127 Cal. Rptr. 164 (1976) (Division 3 of the Second District Court of Appeals followed the decision of Division 2 in *Suter*). Baxter v. Superior court, 58 Cal. App. 3d 519, 129 Cal. Rptr. 806 (1976) (Division 2 of the Second District Court of Appeals). *But see* Mobaldi v. Board of Regents of Univ. of Calif., 55 Cal. App. 3d 573, 586, 127 Cal. Rptr. 720, 729 (1976) (Division 1 of the Second District allowed plaintiff-foster parents to amend cause of action for lost society and companionship "to one legally sufficient under the standards of *Hair*"). There is precedent for a court of appeal refusing to be bound by the supreme court's denial of a petition for hearing. *E.g.*, People v. Rabe, 202 Cal. 409, 418-19, 261 P. 303, 307 (1927) (quoting from the lower appellate court's opinion, which refused to follow a prior decision in which the supreme court had denied a petition for hearing). *See generally* 6 B. WITKIN, CALIFORNIA PROCEDURE PART I § 670 (2d ed. 1971). The supreme court has never expressly reprimanded a court of appeal for refusing to comply with the *Cole v. Rush* directive, although recently it has had at least one excellent opportunity to do so. People v. Bracamonte, 15 Cal. 3rd 394, 540 P.2d 624, 124 Cal. Rptr. 528 (1975), *vacating* 118 Cal. Rptr. 410 (Cal. App. 1975). Perhaps the court's tolerance can be explained in part by the fact that one of the bases for granting a petition for hearing is "to secure uniformity of decision." Cal. Rules of Court 29. Rigid adherence to *Cole v. Rush* would preclude the development of a "conflict" among the districts over a question of first impression unless the conflict arose prior to the first appeal of the question to the supreme court.

As this article was going to press, the California supreme court granted hearing in two cases that denied recovery for loss of a parent's or child's society and companionship. Baxter v. Superior Court, 58 Cal. App. 3d 519, 129 Cal. Rptr. 806 (1976) (*hearing granted* July 19, 1976) (action by parent); Borer v. American Air Lines, 2 Civ. 47568 (Cal. App. 1976) (*hearing granted* July 19, 1976) (action by child).

tortious interference with the intangible qualities of the parent-child relationship, what justification can be advanced for refusing to recognize an action for lost society and companionship?

The first part of this article will discuss whether an action for lost society and companionship should be recognized. It will evaluate the conceptual and policy considerations that have been advanced in support of the common law rule. It will also explore the question of whether it is a denial of equal protection to allow recovery for intangible losses in wrongful death or loss of consortium actions, but not in actions for lost society and companionship. The second part of this article will discuss some of the issues that will arise if an action for the loss of an injured parent's or child's society and companionship is recognized by the courts.

II. Should an Action for Lost Society and Companionship be Recognized?

A. Historical, Conceptual, and Policy Considerations

1. Absence of Precedent

Virtually every court denying compensation for lost society and companionship has premised its decision at least in part on an absence of judicial precedent.[13] However, this rationale will no longer suffice, now that the Wisconsin supreme court has furnished persuasive authority for such an action.[14] Moreover, lack of precedent alone is not an appropriate rationale for denying recovery, since the common law is not static, but evolving.[15] Any court that is concerned about the lack of direct precedent should simply examine the array of analogous precedents for compensating lost society and companionship.

The cases and statutes allowing recovery of nonpecuniary losses for other indirect interferences[16] with the family relationship form the first cluster of analogous precedents. The closest is loss of consortium[17]

[13]*See* cases cited notes 1 & 2 *supra*.

[14]Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975).

[15]*E.g.*, Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 389-404, 525 P.2d 669, 673-79, 115 Cal. Rptr. 765, 769-75 (1974).

[16]Throughout this article, a distinction will be drawn between direct and indirect interferences with relational interests. A direct interference is an act by the defendant with intent to disrupt a relationship (*e.g.*, abduction, criminal conversation, seduction, alienation of affections). An indirect interference is an act by the defendant intentionally or negligently causing injury or death to one party to a relationship, and thereby disrupting the relationship, even though it was not designed to do so (*e.g.*, loss of society and companionship, loss of consortium, wrongful death). An indirect interference may also be caused by conduct subjecting the defendant to strict liability or products liability. *See* Henningson v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

[17]Loss of consortium is the loss of an injured spouse's services, sexual relations, society, and companionship. W. Prosser, *supra* note 3, at § 125, at 889-90.

—an action for an injury-produced, indirect interference with the marital relationship. In almost all jurisdictions, married men are allowed to recover for the loss of a wife's consortium.[18] Since 1950,[19] 36 jurisdictions[20] have also recognized the right of married women to sue for the "sentimental elements" of consortium.[21] Despite the apparent similarity between the actions for lost consortium and lost society and companionship, many courts have rejected the analogy on the ground that a loss of the intangible aspects of the marital relationship is more worthy of compensation than a loss of the intangible aspects of the parent-child relationship.[22] Presumably, these courts have focused on the marital

[18]H. CLARK, *supra* note 3, at § 10.5; 1 F. HARPER & F. JAMES, JR., THE LAW OF TORTS § 8.9 (1956) [hereinafter cited as 1 F. HARPER & F. JAMES]; W. Prosser, *supra* note 3, at § 125; RESTATEMENT (SECOND) OF TORTS § 693 (Tent. Draft No. 14, 1969); Annot., 21 A.L.R. 1517 (1922); Annot., 133 A.L.R. 1156 (1941). *Contra,* KAN. STAT. ANN. § 23-205 (1974); Marri v. Stamford St. R.R., 84 Conn. 9, 78 A. 582 (1911); Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945).

[19]Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir.), *cert. denied,* 340 U.S. 852 (1950), *overruled on other grounds,* Smither & Co. v. Coles, 242 F.2d 220 (D.C. Cir.), *cert. denied,* 354 U.S. 914 (1957).

[20]COLO. REV. STAT. ANN. § 14-2-209 (1974); ME. REV. STAT. ANN. tit. 19, § 167-A (Supp. 1974); MISS. CODE ANN. § 93-3-1 (1973); N.H. REV. STAT. ANN. § 507:8-a (1968); OKLA. STAT. ANN. tit. 32, §15 (1973); ORE. REV. STAT. § 108.010 (1974); S.C. CODE ANN. § 10-2593 (Supp. 1975); TENN. CODE ANN. § 25-109 (Supp. 1974); W. VA. CODE ANN. § 48-3-19a (Supp. 1975); Luther v. Maple, 250 F.2d 916 (8th Cir. 1958) (forecasting Nebraska law); Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D. Mont. 1961) (forecasting Montana law); Swartz v. United States Steel Constr. Co., 293 Ala. 439, 304 So. 2d 881 (1974); Schreiner v. Fruit, 519 P.2d 462 (Alas. 1974); City of Glendale v. Bradshaw, 108 Ariz. 582, 503 P.2d 803 (1972); Missouri Pacific Transp. Co. v. Miller, 227 Ark. 351, 299 S.W.2d 41 (1957); Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974); Stenta v. Leblang, 55 Del. 181, 185 A.2d 759 (1962); Gates v. Foley, 247 So. 2d 40 (Fla. 1971); Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 77 S.E.2d 24 (1953); Nichols v. Sonneman, 91 Idaho 199, 418 P.2d 562 (1966); Dini v. Naditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Troue v. Marker, 253 Ind. 284, 252 N.E.2d 800 (1969); Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1956); Kotsiris v. Ling, 451 S.W.2d 411 (Ky. 1970); Deems v. Western Md. Ry. Co., 247 Md. 95, 231 A.2d 514 (1967); Diaz v. Eli Lilly & Co., 364 Mass. 153, 302 N.E.2d 555 (1973); Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960); Thill v. Modern Erecting Co., 284 Minn. 508, 170 N.W.2d 865 (1969); Novak v. Kansas City Transit, Inc., 365 S.W.2d 539 (Mo. 1963); General Elec. Co. v. Bush, 88 Nev. 354, 498 P.2d 366 (1972); Ekalo v. Constructive Serv. Corp. of Am., 46 N.J. 82, 215 A.2d 1 (1965); Millington v. Southeastern Elev. Co., 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968); Clouston v. Remlinger Oldsmobile Cadillac, Inc., 22 Ohio St. 2d 65, 258 N.E.2d 230 (1970); Hopkins v. Blanco, 457 Pa. 90, 320 A.2d 139 (1974); Hoekstra v. Helgeland, 78 S.D. 82, 98 N.W. 2d 669 (1959); Moran v. Quality Alum. Casting Co., 34 Wis. 2d 542, 150 N.W.2d 137 (1967); RESTATEMENT (SECOND) OF TORTS § 695 (Tent. Draft No. 14, 1969); Annot., 36 A.L.R.3d 900 (1971). Hawaii, Louisiana, and North Dakota have not taken a position on the issue. The remaining jurisdictions deny recovery. Note, *The Wife's Right to Consortium,* 14 WASHBURN L.J. 309, 310-11 (1975).

[21]Women are not allowed to sue for the loss of a husband's services for the reasons discussed in section I.A.2. *infra.*

[22]Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471 (D.C. Cir. 1958); Smith v. Richardson, 277 Ala. 389, 171 So. 2d 96 (1965); Garza v. Kantor, 54 Cal. App. 3d 1025, 127 Cal. Rptr. 164 (1976); Hayrynen v. White Pine Copper Co., 9 Mich. App. 452, 157 N.W.2d 502 (1968); General Elec. Co. v. Bush, 88 Nev. 360, 498 P.2d 366 (1972);

relationship as a source of sexual satisfaction. However, if one views the marital relationship from a broader perspective, the analogy between the two actions becomes more persuasive. It then becomes possible to characterize both actions as compensating for the loss of familial society and companionship.[23]

The wrongful death statutes of several jurisdictions provide another analogy for compensating intangible losses caused by an indirect interference with the family relationship. While many states still limit wrongful death damages to pecuniary losses,[24] there has been a recent trend to allow recovery for nonpecuniary losses as well.[25] In the parent-child context, some courts have given the term "pecuniary loss" a liberal construction, thereby allowing partial recovery of intangible losses.[26] Some legislatures have enacted (or amended) wrongful death statutes to abolish the pecuniary loss limitation altogether by expressly allowing

Russell v. Salem Transp. Co., 61 N.J. 502, 295 A.2d 862 (1972); Quinn v. City of Pittsburgh, 243 Pa. 521, 90 A. 353 (1914); Erhardt v. Havens, Inc., 53 Wash. 2d 103, 330 P.2d 1010 (1958). Furthermore, a few courts recognizing a wife's action for loss of consortium have expressed concern that they will be asked to extend a comparable cause of action to children. *See, e.g.*, Swartz v. United States Steel Constr. Co., 293 Ala. 439, 304 So. 2d 881, 887 (1974); Deems v. Western Md. Ry. Co., 247 Md. 95, 114, 231 A.2d 514, 525 (1967); Diaz v. Eli Lilly Co., 364 Mass. 153, 165, 302 N.E.2d 555, 563 (1973); Thill v. Modern Erecting Co., 284 Minn. 508, 511, 170 N.W.2d 865, 868 (1969); Novak v. Kansas City Transit, Inc., 365 S.W.2d 539, 546 (Mo. 1963).

[23]Hair v. County of Monterey, 45 Cal. App. 3d 538, 119 Cal. Rptr. 639 (1975).

[24]The first wrongful death statute, the Fatal Accidents Act of 1846, 9 & 10 Vict., c. 93 (popularly known as Lord Campbell's Act), was construed to allow recovery solely for pecuniary losses. Blake v. Midland Ry., 118 Eng. Rep. 35, 41-42 (Q.B. 1852). For a complete listing of the jurisdictions that still limit damages to pecuniary losses, see S. SPEISER, RECOVERY FOR WRONGFUL DEATH, § 3.1, at 104-09 (2d ed. 1975) [hereinafter cited as S. SPEISER].

[25]For a complete listing of the jurisdictions that allow recovery for nonpecuniary losses, see S. SPEISER, *supra* note 24, at § 3.1, at 113-15; Annot., 74 A.L.R. 11 (1931). For a discussion of the measure of damages recoverable in a wrongful death action by a parent or a child, see 2 F. HARPER & F. JAMES, JR., THE LAW OF TORTS § 25.14 (1956) (Supp. 1968); W. PROSSER, *supra* note 3, at § 27; S. SPEISER, *supra* note 24, at §§ 4.17-.40. For a discussion of the measure of damages recoverable in an action by a parent, see Decof, *Damages in Actions for Wrongful Death of Children*, 47 NOTRE DAME LAW 197 (1971); Finkelstein, Pickrel & Glasser, *The Death of Children: A Nonparametric Statistical Analysis of Compensation for Anguish*, 74 COLUM. L. REV. 885 (1974); Johnson, *Wrongful Death and Intellectual Dishonesty*, 16 S.D. L. REV. 36 (1971); Comment, *Damages for Wrongful Death of Children*, 22 U. CHI. L. REV. 538 (1955); Annot., 15 A.L.R.3d 992 (1967); Annot., 14 A.L.R.2d 485 (1950); Annot., 14 A.L.R.2d 550 (1950).

[26]Courts at times indirectly compensate nonpecuniary losses by refusing to set aside verdicts for parents, even though the jury must have failed to subtract the cost of raising a child from the value of the child's lost services. *See, e.g.*, Ferguson, *Damages for the Death of a Minor Child Under the Texas Wrongful Death Act*, 4 ST. MARY'S L.J. 157 (1972); Comment, *Damages for Wrongful Death of Children*, 22 U. CHI. L. REV. 538 (1955). Some courts have expanded the term "pecuniary loss" to encompass the loss of the parent's training and guidance. *See, e.g.*, Hoppe v. Peterson, 196 Minn. 538, 265 N.W. 338 (1936); S. SPEISER, *supra* note 24, at § 4.18. A few courts even permit recovery of the "pecuniary value" of a parent's or child's society and companionship. *See, e.g.*, Fuentes v. Tucker, 31 Cal. 2d 1, 187 P.2d 752 (1947); S. SPEISER, *supra* note 24, at § 3.49, at 318-20 & n.3.

recovery for lost society and companionship[27] or mental anguish, grief, and sorrow.[28] More recently, several courts have abolished the pecuniary loss limitation by a liberal construction of a vaguely worded statute.[29] The trend in 30 jurisdictions to allow the recovery of nonpecuniary losses in wrongful death actions sharply contrasts with the rule denying recovery for such losses when a physical injury interferes with the parent-child relationship.

The other cluster of analogous precedents is found in cases and statutes allowing recovery of nonpecuniary losses for a direct interference[30] with the family relationship. Husbands and wives can recover damages for such losses in actions for abduction,[31] criminal conversation,[32] and alienation of affections;[33] parents can recoup intangible

[27]ALASKA STAT. § 90.55.580 (1973) ("loss of consortium; loss of prospective training and education"); FLA. STAT. ANN. § 768.21(3) (Supp. 1975) (minor children may recover for lost parental companionship); HAWAII REV. LAWS § 663-3 (Supp. 1974); IOWA CODE ANN. RULE CIV. PRO. 8 (Supp. 1974) (action by parent for loss of child's society and companionship); KAN. STAT. ANN. 60-1904 (1964); KY. REV. STAT. ANN. § 411.135 (1972) (parents may recover for loss of affection and companionship of child during its minority); ME. REV. STAT. ANN. tit. 18, § 2552 (Supp. 1974) (action by parent for loss of child's society and companionship); MD. ANN. CODE, Courts & Judicial Proceedings § 3-904 (1974) (action by parent for loss of child's society, companionship, comfort); MASS. GEN. LAWS ANN. ch. 229, § 2 (Supp. 1975); MICH. STAT. ANN. § 27A.2922 (Supp. 1975); N.C. GEN. STAT. § 28-174 (Supp. 1974); ORE. REV. STAT. § 30.020 (1974); VA. CODE ANN. § 8-636.1 (Supp. 1974); WASH. REV. CODE ANN. § 4.24.010 (Supp. 1975) (action by parent for loss of love and companionship of child and for injury to or destruction of parent-child relationship); WIS. STAT. ANN. § 895.04 (Supp. 1974); WYO. STAT. ANN. § 1-1066 (Supp. 1975).

[28]ARK. STAT. ANN. § 27-909 (1962); FLA. STAT. ANN. § 768.21 (3)(4) (1975) (parents and minor children may recover for mental pain and suffering); KAN. STAT. ANN. § 60-1904 (1964); MD. ANN. CODE, Courts & Judicial Proceedings § 3-904 (1974) (action by parent for mental anguish, emotional pain and suffering); VA. CODE ANN. § 8-636.1 (Supp. 1974).

[29]Boies v. Cole, 99 Ariz. 198, 407 P.2d 917 (1965); Anderson v. Great Northern Ry., 15 Idaho 513, 99 P. 91 (1908); American Car Loading Corp. v. Gary Trust & Savings Bank, 216 Ind. 649, 25 N.E.2d 777 (1940); Lewis v. State, 176 So. 2d 718 (La. App. 1965); St. Louis & S.F.R.R. v. Moore, 101 Miss. 768, 58 So. 471 (1912); Wyant v. Dunn, 140 Mont. 181, 368 P.2d 917 (1962); Selders v. Armentrout, 190 Neb. 275, 207 N.W.2d 686 (1973); Porter v. Funkhouser, 79 Nev. 273, 382 P.2d 216 (1963); Orta v. Puerto Rico Ry. Light & Power Co., 36 P.R.R. 668 (1927); Smith v. Wells, 258 S.C. 316, 188 S.E.2d 470 (1972); Van Cleave v. Lynch, 101 Utah 149, 166 P.2d 244 (1946); Wilson v. Lund, 80 Wash. 2d 91, 491 P.2d 1287 (1971) (parents can recover for grief and mental anguish); Bower v. Brannon, 141 W. Va. 435, 90 S.E.2d 342 (1955); Kelley v. Ohio River R.R., 58 W. Va. 216, 52 S.E. 520 (1906). *See also* Sea Land Services v. Gaudet, 414 U.S. 573 (1974) (allowing recovery for loss of society in common law wrongful death action under federal maritime law).

[30]For a definition of the term "direct interference," see note 16 *supra*.

[31]W. PROSSER, *supra* note 3, at § 124, at 874-75; RESTATEMENT (Second) OF TORTS § 684 (Tent. Draft No. 14, 1969).

[32]H. CLARK, *supra* note 3, at § 10.3; 1 F. HARPER & F. JAMES, *supra* note 18, at § 8.3; W. PROSSER, *supra* note 3, at § 124; RESTATEMENT OF TORTS §§ 685, 690 (1938); Annot., 68 A.L.R. 560 (1930); Annot., 28 A.L.R. 327 (1924); Annot., 4 A.L.R. 569 (1919).

[33]H. CLARK, *supra* note 3, at § 10.2; 1 F. HARPER & F. JAMES, *supra* note 18, at § 8.3; W. PROSSER, *supra* note 3, at § 124; RESTATEMENT OF TORTS §§ 683, 690 (1938). An action for criminal conversation is an action for adultery; an action for alienation of

losses in suits for abduction, seduction, and enticement;[34] and children have the right in three jurisdictions to sue for alienation of a parent's affections.[35] It has been suggested, however, that damages for nonpecuniary losses should be limited to actions for a direct interference with the family relationship because defendants who *directly* interfere act deliberately to destroy the family relationship, while defendants who *indirectly* interfere merely cause physical injury to a person who happens to be a family member.[36] Yet, as noted above, courts do allow recovery of nonpecuniary losses for some indirect interferences with the family relationship.[37] Moreover, if compensation is the principal function of tort law, the manner in which a nonpecuniary loss is caused ought not to be decisive in determining whether it is actionable.[38]

2. Master–Servant Analogy

Some courts have denied recovery for lost society and companionship on the ground that the parent-child relationship is comparable to the master-servant relationship and, therefore, only pecuniary damages should be awarded for an indirect interference with it.[39] Historically, there may be some justification for this theory.[40] Recovery for tortious interference with a relational interest was first allowed in actions by masters. Given the economic nature of the master-servant relationship,

affections is a broader action for any direct interference with the marital relationship. Brown, *The Action for Alienation of Affections*, 82 U. PA. L. REV. 472, 473-74 (1934). "Heart balm" legislation abolishing the actions for criminal conversation and alienation of affections has been enacted in approximately 15 jurisdictions for the purpose of eliminating opportunities for blackmail. H. CLARK, *supra* note 3; at § 10.2, at 267 nn.48-51; Annot., 167 A.L.R. 235 (1947); Annot., 158 A.L.R. 617 (1945).

[34]For a description of the law governing direct interferences with the parent-child relationship in the United States today, see H. CLARK, *supra* note 3, at § 10.4; 1 F. HARPER & F. JAMES, *supra* note 18, at §§ 8.5-8.7; W. PROSSER, *supra* note 3, at § 124, at 882-88; RESTATEMENT OF TORTS §§ 700-01 (1938). In some jurisdictions with "heart balm" legislation, the courts have refused to allow recovery for enticement. *See, e.g.*, McGrady v. Rosenbaum, 62 Misc. 2d 182, 308 N.Y.S.2d 181, *aff'd* 37 App. Div. 2d 917, 324 N.Y.S. d 876 (1970).

[35]Daily v. Parker, 152 F.2d 174 (7th Cir. 1945); Johnson v. Luhman, 330 Ill. App. 598, 71 N.E.2d 810 (1947); Miller v. Monsen, 228 Minn. 400, 37 N.W.2d 543 (1949); Annot., 60 A.L.R.3d 931, § 3(b) (1974). Most jurisdictions deny recovery, however. RESTATEMENT (SECOND) OF TORTS § 702A (Tent. Draft No. 14, 1969); Annot., 60 A.L.R.3d 931, § 3(a) (1974).

[36]*See* H. CLARK, *supra* note 3 at 277-78.

[37]*See* text accompanying notes 16-29 *supra*.

[38]*See* H. CLARK, *supra* note 3, at 277-78.

[39]*See* cases cited notes 1-2 *supra*.

[40]For other discussions of the historical development of actions for a tortious interference with relational interests, see Foster, Jr., *Relational Interests of the Family*, 1962 U. ILL. L.F. 493; Green, *Relational Interests*, 29 ILL. L. REV. 460 (1934); Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177 (1916).

compensation was limited to pecuniary damages for lost services.[41] When the courts later imposed liability for tortious interference with family relationships, recognition of the right to recover was premised in large part on the master-servant analogy.[42] Paradoxically, however, husbands were allowed to recover for both pecuniary and nonpecuniary losses,[43] while parents (like masters) were restricted to damages for lost services,[44] and married women[45] and children[46] (like servants) had no standing to sue.[47]

The courts first departed from the master-servant analogy in an action for an indirect interference with a relational interest[48] in 1950, when it was held that a married woman could recover for loss of consortium, despite her inability to prove that she had sustained a loss of her husband's services.[49] A majority of jurisdictions now adhere to

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[41]By the end of the eighteenth century, a master could recover damages for lost services from a third person who abducted or beat his servant or persuaded his servant to leave him. Brett, *Consortium and Servitium: A History and Some Proposals*, 29 AUST. L.J. 321, 322-25, 389, 492 (1955) [hereinafter cited as Brett].

[42]For an excellent comparison of the historical development of the actions for interference with the master-servant and husband-wife relationships, *see* Brett, *supra* note 41. For a discussion of the historical development of actions for interference with the parent-child relationship, *see* J. FLEMING, THE LAW OF TORTS 574 (4th ed. 1971); J. SALMOND, LAW OF TORTS 501-06 (14th ed. 1965); P. WINFIELD, TORTS 527-29 (8th ed. 1967).

[43]*E.g.*, Hyde v. Scyssor, 79 Eng. Rep. 402 (K.B. 1619) (awarding damages for loss of injured wife's "company and aid"); Guy v. Livesey, 79 Eng. Rep. 428 (K.B. 1618) (awarding damages for loss of injured wife's "company"). RESTATEMENT OF TORTS § 693 Comment *e* (Tent. Draft. No. 14, 1969).

[44]*See* Pickle v. Page, 252 N.Y. 474, 169 N.E. 650 (1930) (summarizing common law). RESTATEMENT OF TORTS § 703, Comment *h* (1938).

[45]*E.g.*, Best v. Samuel Fox & Co., [1952] A.C. 716 (refusing to depart from common law rule that married women may not recover for loss of consortium). RESTATEMENT OF TORTS § 695 (1938). Married women, of course, had no procedural standing to sue prior to the enactment of the Married Women's Property Acts in England and the United States during the last half of the nineteenth century. H. CLARK, *supra* note 3, at § 7.2.

[46]J. FLEMING, THE LAW OF TORTS 575, 579, 582-87 (4th ed. 1971); J. SALMOND, LAW OF TORTS 501-02, 756-63 (14th ed. 1965); RESTATEMENT (SECOND) OF TORTS § 707A (Tent. Draft No. 14, 1969).

[47]The following passage from Blackstone is the classic explanation for the inability of servants, wives and children to sue:

> We may observe that, in these relative injuries [*i.e.*, injuries to the master-servant, husband-wife and parent-child relationships], notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantage accruing therefrom; while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury.

3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 142-43 (1768).

[48]Prior to 1950, married women had been allowed to sue for direct interferences with the marital relationship. *See* notes 31-33 *supra*.

[49]*See* cases cited note 19 *supra*.

this position.[50] Today, the question is whether the courts should also reject the master-servant analogy in the parent-child context.[51] Several changes in the law governing the parent-child relationship suggest that such a reform is long overdue.[52] For example, although child labor may once have been an important economic asset to parents, compulsory education,[53] child labor laws,[54] and the lowering of the age of majority[55] have all diminished the value of a child's services.[56] From the child's perspective, the enactment of child support legislation[57] has given minors a legally enforceable right to support, if not to parental services. The upshot of these developments is that "[s]ociety and companionship between parents and their children are closer to our present day family ideal than the right of the parents to the 'earning capacity during minority,' which once seemed so important when the common law was originally established."[58] Accordingly, the master-servant analogy ought to be abandoned and tort law should begin to protect the interest in society and companionship that is the very essence of family life.

3. Compensation for Expectation Interest

A few courts have taken the position that since parents and children have a moral, but not a legal, obligation to give each other society and companionship, third-party tortfeasors are not subject to liability for diminishing their capacity to accord each other the intangible benefits of family life.[59] However, the absence of a legally enforceable obligation

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[50]*See* statutes and cases cited note 20 *supra.*

[51]It should be noted that some courts have already rejected the master-servant analogy in actions for a direct interference with the parent-child relationship. *See* notes 34-35 *supra.*

[52]*See generally* H. FOSTER, A "BILL OF RIGHTS" FOR CHILDREN (1974); THE YOUNGEST MINORITY (S. Katz ed. 1974).

[53]H. CLARK, *supra* note 3, at § 8.1(m), at 234.

[54]H. CLARK, *supra* note 3, at § 8.1(k), at 234.

[55]Katz, Schroeder & Sidman, *Emancipating our Children—Coming of Legal Age in America,* 7 FAM. L. Q. 211, 213 n.16 (1973) (collects statutes lowering age of majority).

[56]The law still holds that the child's earnings are the property of the parent. H. CLARK, *supra* note 3, at § 8.1(k), at 234. For an argument that the common law rule should be abrogated, see H. FOSTER, A "BILL OF RIGHTS" FOR CHILDREN 47-48 (1974).

[57]H. CLARK, *supra* note 3, at § 6.7. Although a child's right to support under such legislation is generally enforced by the state, on occasion a child has been allowed to bring an action directly against the parent. *See, e.g.,* Campbell v. Campbell, 200 S.C. 67, 20 S.E.2d 237 (1942).

[58]Shockley v. Prier, 66 Wis. 2d 394, 401, 225 N.W.2d 495, 499 (1975).

[59]*E.g.,* Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471 (D.C. Cir. 1958); Cox v. Stretton, 77 Misc. 2d 155, 159, 352 N.Y.S.2d 834, 840 (Sup. Ct. 1974). *See also* Nelson v. Richwagen, 326 Mass. 485, 95 N.E.2d 545 (1950); Henson v. Thomas, 231 N.C. 173, 56 S.E.2d 432 (1949).

is merely a reflection of the limitations on legal remedies.[60] It does not denigrate the importance of protecting a parent's or child's expectation of society and companionship against tortious interference.[61] There is ample precedent for allowing recovery for interference with "expectation interests" of this kind. For example, in a majority of jurisdictions, spouses who can obtain neither specific relief nor damages against each other for failure to provide marital society and companionship nevertheless have a cause of action against third-party tortfeasors who indirectly cause a loss of consortium.[62] It is therefore a makeweight argument to contend that parents and children cannot obtain compensation from a third-party tortfeasor for damaging the intangible qualities of the family relationship because they have only a moral obligation to accord each other society and companionship.

4. Remote and Uncertain Damages

Another objection frequently voiced by courts denying recovery is that damages for lost society and companionship are too remote and uncertain to be legally cognizable.[63] While it is true that an action for lost society and companionship is brought by a "secondary tort victim"[64] and, in that sense, is "remote," there has been a discernible trend in recent years toward allowing recovery by secondary tort victims, as in actions for loss of consortium,[65] wrongful death,[66] and the indirect infliction of emotional distress to witnesses of an accident.[67] Although a secondary tort victim is normally permitted to recover for an intangible

[60]These limitations are alluded to in Wald, *State Intervention on Behalf of "Neglected" Children,* 27 STAN. L. REV. 985, 987 n.10 (1975).

[61]The importance of a parent's psychological support, love, and affection has recently been recognized by a few jurisdictions in other contexts, such as child abuse reporting legislation and child neglect laws. *See, e.g.,* H. FOSTER, A "BILL OF RIGHTS" FOR CHILDREN 11-30 (1974); Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse,* 12 AM. CRIM. L.Q. 103, 107 & n.12 (1974).

[62]*See* notes 18-20 *supra.* In several states, spouses, parents, and children may also recover for an indirect interference with their expectation of receiving society and companionship under wrongful death legislation. *See* notes 25, 27-29 *supra.*

[63]Suter v. Leonard, 45 Cal. App. 3d 744, 120 Cal. Rptr. 110 (1975); Hoffman v. Dautel, 189 Kan. 165, 368 P.2d 57 (1962); Russell v. Salem Transp. Co., 61 N.J. 502, 295 A.2d 862 (1972); Duhan v. Milanowski, 75 Misc. 2d 1078, 348 N.Y.S.2d 696 (1973).

[64]The term "secondary tort victim" has been defined as a plaintiff who has "no spatial or legal relationship with the alleged wrongdoer." Adams v. Southern Pac. Transp. Co., 50 Cal. App. 3d 37, 43, 123 Cal. Rptr. 216, 219 (1975). *See generally* Rintala, *The Supreme Court of California 1968-69—Foreward,* 58 CAL. L. REV. 80 (1970).

[65]*See* notes 18-20 *supra.*

[66]*See* notes 24-29 *supra.*

[67]*E.g.,* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). *See* cases cited in Annot., 29 A.L.R.3d 1316 (1968).

loss only upon proof of a resulting physical injury,[68] or a special relationship with the primary tort victim,[69] surely the parent-child relationship is sufficiently close to ensure the validity of the plaintiff's claim. It is also true that the action is for "uncertain" damages insofar as compensation is sought for an intangible loss. But many compensable items, including pain and suffering,[70] emotional distress,[71] loss of marital consortium[72] and nonpecuniary death damages,[73] are equally uncertain. Moreover, most courts permit parents[74] (and a few permit children[75]) to recover for lost society and companionship when there has been a direct interference with the family relationship. Damages for an indirect interference would be no more uncertain.

5. Practical Problems: Double Recovery and Multiple Suits

Several courts have recognized the sympathetic appeal of the plaintiff's plea, but, foreseeing practical difficulties, have declined to engage in "judicial legislation" to grant relief.[76] The two problems of greatest concern to these courts have been the dangers of double recovery and multiple suits.

There are actually two perceived threats of double recovery. In an action by a child, the plaintiff might recover not only for lost society and companionship, but also for the loss of the parent's support (which is compensable in the parent's action for personal injuries).[77] In an action by either a parent or a child, damages for the secondary tort victim's loss of the intangible benefits of the parent-child relationship might be indirectly recoverable in the primary tort victim's action for personal injuries.[78] However, jurisdictions recognizing a wife's action for the

[68] *E.g.*, Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). In actions for the negligent infliction of emotional distress, there must also be evidence that the plaintiff was near the scene of the accident. *See* cases collected in Annot., 29 A.L.R.3d 1316 (1968).

[69] In an action for loss of consortium, the plaintiff is the spouse of the primary tort victim, and in wrongful death action, the beneficiary is normally the deceased's heir.

[70] *E.g.*, Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498, 364 P.2d 337, 15 Cal. Rptr. 161 (1961). *See generally* J. STEIN, DAMAGES AND RECOVERY §§ 8-29 (1972).

[71] *See* note 67 *supra.*

[72] *See* notes 18-20 *supra.*

[73] *See* notes 27-29 *supra.*

[74] *See* note 34 *supra.*

[75] *See* note 35 *supra.*

[76] *E.g.*, Hankins v. Derby, 211 N.W.2d 581 (Iowa 1973); Hoffman v. Dautel, 189 Kan. 165, 368 P.2d 57 (1962); General Elec. Co. v. Bush, 88 Nev. 360, 498 P.2d 366 (1972).

[77] *E.g.*, Halberg v. Young, 41 Hawaii 634, 59 A.L.R.2d 445 (1957); Russell v. Salem Transp. Co., 61 N.J. 502, 295 A.2d 862 (1972).

[78] Hoffman v. Dautel, 189 Kan. 165, 368 P.2d 57 (1962); Russell v. Salem Transp. Co., 61 N.J. 502, 295 A.2d 862 (1972).

loss of her husband's consortium have found ways to solve the double recovery problem. To preclude the wife from recovering for loss of her husband's earning capacity, the courts have either recommended that the jury be carefully instructed on the elements of damage compensable in the wife's action,[79] or have required joinder with the husband's action for personal injuries.[80] Similar techniques could be used in suits for lost society and companionship. In fact, in the two decisions expressing a willingness to allow recovery, the courts have required joinder of the parent's suit for lost society and companionship with the child's action for personal injuries.[81] Thus, the problem of double recovery is clearly susceptible to judicial solution.

The spectre of multiple suits against the same defendant is a matter of concern principally in actions brought by children for loss of parental society and companionship.[82] While a spouse's action for loss of consortium adds only one companion claim, "the right here debated would entail adding as many companion claims as the injured parent had minor children, each such claim entitled to separate appraisal and award."[83] This problem could be readily solved, however, by requiring all of the children in a single family to sue as a class,[84] leaving the apportionment of damages to the judge or jury.[85]

6. Increased Insurance Costs

Yet another objection to the action for lost society and companionship is that it will trigger a substantial increase in insurance costs.[86] A slight increase is to be expected, and presumably will not deter judicial recognition of the action. But it is impossible to predict the precise impact of this change on premiums. If compensation should later prove too costly, the legislature could always put a ceiling on the amount of damages recoverable,[87] as the Wisconsin legislature has done in wrongful death actions for lost society and companionship.[88] The prin-

[79]*See* note 205 *infra.*

[80]*See* text accompanying notes 209-13 *infra.*

[81]Hair v. County of Monterey, 45 Cal. App. 3d 538, 119 Cal. Rptr. 639 (1975); Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975).

[82]*E.g.*, Jeune v. Del E. Webb Const. Co., 77 Ariz. 226, 269 P.2d 723 (1954); Hoffman v. Dautel, 189 Kan. 165, 368 P.2d 57 (1962); Eschenbach v. Benjamin, 195 Minn. 378, 263 N.W. 154 (1935).

[83]Russell v. Salem Transp. Co., 61 N.J. 502, 506, 295 A.2d 862, 864 (1972).

[84]Duhan v. Milanowski, 75 Misc. 2d 1078, 1083, 348 N.Y.S.2d 696, 702 (Sup. Ct. 1973).

[85]*See* section III. D. *infra.*

[86]Suter v. Leonard, 45 Cal. App. 3d 744, 120 Cal. Rptr. 110 (1975); Russell v. Salem Transp. Co., 65 N.J. 502, 295 A.2d 862 (1972). *See also* Jaffe, *Damages for Personal Injury: The Impact of Insurance,* 18 Law & Contemp. Prob. 219 (1953).

[87]Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975).

[88]The text of the statute is set out in note 6 *supra.*

cipal drawback of such legislation is its inflexibility, but an arbitrary limit on the amount of damages recoverable seems preferable to no redress at all.

7. Summary

Courts denying recovery for lost society and companionship have voiced a number of concerns, including 1) the lack of precedent; 2) the continuing vitality of the master-servant analogy; 3) the absence of any legal obligation for a parent or child to accord the other society and companionship; 4) the "remote" and "uncertain" nature of the damages; 5) the desirability of allowing the legislature to solve such practical problems as the danger of "double recovery" and "multiple suits," and 6) the potential increase in insurance costs. The first three concerns can most appropriately be categorized as makeweight arguments. The common law is not static, the master-servant analogy is a relic of the past, and precedents abound for allowing parents and children to sue third-party tortfeasors who interfere with their "expectation" of receiving society and companionship. It is the last three concerns that have troubled the courts most seriously. The question is whether these problems warrant the denial of relief for lost society and companionship. The preceding discussion has suggested that they do not. Although the action would allow recovery of nonpecuniary damages by a secondary tort victim, the closeness of the parent-child relationship ought to eliminate any perceived danger of spurious claims. It should be no more difficult to assess the monetary value of lost society and companionship than to evaluate any other legally compensable, intangible loss. In fact, damages for the loss of a parent's or child's society and companionship are already awarded in actions for a direct interference with the parent-child relationship and in wrongful death actions. The practical problems inherent in any action by a secondary tort victim (including the dangers of double recovery and a multiplicity of suits) can be resolved. And should there be a disproportionate rise in insurance costs directly attributable to recognition of this new cause of action, the legislature could limit the total amount of damages recoverable for lost society and companionship.

The ultimate question is where to draw the line between liability and nonliability. Those courts that refuse to recognize a parent's or child's action know that brothers and sisters, grandparents and grandchildren, as well as aunts, uncles, nieces and nephews are waiting in the wings. Although the line must be drawn somewhere, there is no

reason to draw it between an action for lost society and companionship caused by the tortious infliction of death to a parent or child and an action for the same type of damage caused by physical injury. Nor need it be drawn between a spouse's action for loss of consortium and a parent's or child's action for lost society and companionship. Indeed, these distinctions are sufficiently irrational that they suggest a possible violation of the equal protection clause.

B. Equal Protection Considerations

It could be argued that it is a denial of equal protection[89] for the legislature or judiciary[90] to restrict damages for lost society and companionship to either the parents and children of a *deceased* tort victim or the *spouse* of an injured tort victim. It could then be contended that the courts should extend the right to recover such damages to the parents and children of an injured tort victim.[91] Even if a court were unwilling

[89]The fourteenth amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Analogous provisions may be found in most state constitutions. *E.g.*, FLA. CONST. art. 1, § 2; IDAHO CONST. art. 1, § 2; IOWA CONST. art. 1, § 6; KAN. CONST. Bill of Rts. §§ 1-2; N.Y. CONST. art. I, § 11; ORE. CONST. art. 1, § 20; PA. CONST. art. 1, § 1. Such equal protection guarantees prohibit the creation of a classification that does not bear an adequate relationship to state objectives purportedly served by the classification. For a general discussion of equal protection, see Tussman & TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-1132 (1969).

Only the denial of equal protection will be considered in this section because it is probably the most viable constitutional argument. Other state or federal constitutional provisions could be invoked, however. For example, it could be asserted that a refusal to recognize the action for lost society and companionship is a denial of due process. *See generally* Tribe, *Forword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973); Tribe, *Structural Due Process*, 10 HARV. CIV. RTS.—CIV. LIB. L. REV. 269 (1975). Counsel advancing such an argument would contend that the "liberty" protected by the due process clause is broad enough to encompass the interest of a parent or child in the other's society and companionship. *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972). *See also* Roe v. Wade, 410 U.S. 113, 152-53 (1973) (collecting prior cases recognizing the importance of the family relationship). Consequently, counsel would assert that a parent or child has a constitutionally protected interest in familial society and companionship, including a right to compensation for a tortious interference with the interest, against which must be balanced the state's interest in denying such recovery. The problem with this argument is that it indirectly requires counsel to take the position that there is a constitutional right to sue in tort—a proposition which has not yet met with judicial favor. *See* note 118 *infra*.

[90]*E.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948). Although there are two classifications under discussion in this section, the judiciary has only drawn the one allowing a spouse but not a parent or child of an injured person to obtain compensation for lost society and companionship.

[91]When a statute violates the equal protection clause because it is underinclusive, there are two remedial alternatives: "a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." Welsh v. United States, 398 U.S. 333, 361 (1970) (concurring opinion). On occasion, courts have expressed reluctance to extend the coverage of a statute for fear of violating the

to decide the constitutional question, this line of argument might persuade it to exercise its common law power to recognize a new cause of action.[92]

1. Loss of Deceased's vs. Injured Person's Society and Companionship

Turning first to the legislative classification,[93] is it a denial of equal protection to award damages for lost society and companionship to persons whose children or parents have been killed, but not to those whose children or parents have been injured?[94] The argument has been advanced in at least three cases from two jurisdictions,[95] but without success. In California, however, wrongful death damages are limited to the "pecuniary value" of lost society and companionship.[96] In New Jersey, they are recoverable "solely for pecuniary loss, albeit that may include services or nurture having pecuniary value, but it

separation of powers doctrine. *E.g.*, Homemakers, Inc. of L.A. v. Division of Indus. Welfare, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 96 S.Ct. 803 (1976). *But see* Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th Cir. 1972). On other occasions, invoking notions of federalism, the Supreme Court has declined to determine whether the most appropriate remedy is the nullification or extension of an underinclusive statute, and has remanded the case to the state court for a resolution of this issue. Stanton v. Stanton, 421 U.S. 7, 17-18 (1975); *accord*, Skinner v. Oklahoma, 316 U.S. 535, 542-43 (1942). However, in two cases holding that a state statute authorizing the recovery of tort damages was underinclusive, neither the separation of powers doctrine nor federalism disuaded the Supreme Court from extending rather than nullifying legislation. Levy v. Louisiana, 391 U.S. 68 (1968) (wrongful death benefits extended to illegitimate children); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (wrongful death benefits extended to mother of illegitimate child). These cases suggest that, in a lost society and companionship action, if wrongful death or loss of consortium statutes were deemed to be underinclusive, the courts would probably be willing to extend the statutory benefits to parents and children. And if the underinclusive classification were of judicial origin, the courts should be even more willing to extend the benefits of the challenged judicial decision. The separation of powers doctrine would not pose a problem, and there is precedent for a federal court to extend the benefits accorded by an underinclusive state court tort law decision. *E.g.*, Duncan v. General Motors Corp., 499 F.2d 835 (10th Cir. 1974) (extending the right of married men to recover for loss of consortium under Oklahoma law to married women).

[92] *E.g.*, Deems v. Western Md. Ry., 247 Md. 95, 231 A.2d 514 (1967).

[93] *See* notes 24-29 *supra* & text accompanying.

[94] It has been suggested that this is an improper characterization of the classification drawn by wrongful death acts because such statutes typically allow recovery by all heirs or persons dependent on the deceased, and not exclusively by parents and children. Russell v. Salem Transp. Co., 61 N.J. 502, 507-08, 295 A.2d 862, 865 (1972). However, a statute that is nondiscriminatory on its face nevertheless may be discriminatory in operation. *See, e.g.*, Williams v. Illinois, 399 U.S. 235, 242 (1970); Griffin v. Illinois, 351 U.S. 12, 17 n.11 (1956). Moreover, there is nothing to preclude other beneficiaries of wrongful death damages from challenging the death-injury classification, although they may not be as successful as parents and children because of the greater societal-constitutional significance attached to the parent-child relationship. *See* notes 107-17 *infra* & text accompanying.

[95] Garza v. Kantor, 54 Cal. App. 3d 1025, 127 Cal. Rptr. 164 (1976); Suter v. Leonard, 45 Cal. App. 3d 744, 120 Cal. Rptr. 110 (1975); Russell v. Salem Transp. Co., 61 N.J. 502, 295 A.2d 862 (1972).

[96] Fuentes v. Tucker, 31 Cal. 2d 1, 187 P.2d 752 (1947). *See* note 26 *supra*.

does not include loss of companionship and society as such."[97] Thus none of the three cases was an optimal vehicle for raising the equal protection argument. Counsel would be well-advised to add the equal protection arrow to plaintiff's quiver only in jurisdictions that explicitly permit recovery for lost society and companionship in a wrongful death action.[98]

Once confronted with this legislative classification, what standard of review should counsel request a court to apply? None of the cases considering the question expressly articulated the standard of review adopted, although the nature of the analysis suggests that all three courts invoked the lower of the two traditional standards of review.[99] Of course, counsel for the plaintiff would prefer to have the death-injury classification strictly scrutinized,[100] but it is doubtful that this standard would be appropriate.[101] On the other hand, under the lower standard of review,[102] the classification would probably withstand the challenge, considering that the reasons for denying recovery set forth in the preceding section, however unconvincing they may be, would probably be deemed sufficient to provide a rational basis for the classification. Accordingly, counsel would be impelled to urge the court to apply an intermediate standard of review.[103] Although the existence of an

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[97] Russell v. Salem Transp. Co., 61 N.J. 502, 508, 295 A.2d 862, 865 (1972).

[98] *See* notes 27-29 *supra* & text accompanying.

[99] Garza v. Kantor, 54 Cal. App. 3d 1025, 127 Cal. Rptr. 164 (1976) (upholding classification); Suter v. Leonard, 45 Cal. App. 3d 744, 747-48, 120 Cal. Rptr. 110, 112-13 (1975) (same); Russell v. Salem Transp. Co., 61 N.J. 502, 508, 295 A.2d 862, 865 (1972) (same).

[100] Under this very rigorous standard of review, a classification will be upheld only if it is demonstrated that the classification is "necessary" to promote a "compelling" state interest, and that another, less burdensome classification would not adequately advance the interest. *E.g.*, Dunn v. Blumstein, 405 U.S. 330, 342-43 (1971).

[101] The "death-injury" classification is not based on a "suspect criterion," such as race (McLaughlin v. Florida, 379 U.S. 184 (1964)), national origin (Oyama v. California, 332 U.S. 633 (1948)), or alienage (Graham v. Richardson, 403 U.S. 365 (1971)). It would also be difficult to show that it burdens a "fundamental interest" now that the Supreme Court has defined such an interest as one "explicitly or implicitly guaranteed by the Constitution." San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973). Although the Court has recognized a constitutionally-guaranteed right to privacy protecting family relationships, it has not held that this fundamental interest extends to the right to sue in tort for an interference with a family relationship. *See* Wright v. Action Vending Co., 544 P.2d 82, 86-87 (Alas. 1975) (right to sue for loss of consortium is not so "fundamental" as to require strict scrutiny). *See also* notes 107-18 *infra* & text accompanying.

[102] The lower standard of review simply requires a showing that there is a "rational" relationship between the classification and the objectives it is designed to advance. *E.g.*, Lehnhausen v. Lake Shore Auto Parts, 410 U.S. 356, 364 (1973); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911). The classification is presumed to be constitutional, and will be upheld if it is not "wholly irrelevant" to the achievement of any "conceivable" legitimate state objective. McGowan v. Maryland, 366 U.S. 420 (1961).

[103] Professor Gunther first advanced the theory that the Supreme Court was applying an intermediate standard of review when it refused to uphold seven legislative classifications

intermediate standard remains a subject for debate,[104] this article will analyze the "death-injury" classification under the *Reed* test,[105] which has been used as an intermediate standard of review by state courts in torts cases striking down guest statutes.[106]

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during the 1971 Term without applying the strict scrutiny standard of review. Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972). The court has continued to use the equal protection clause on occasion as an interventionist tool without resorting to strict scrutiny. *The Supreme Court, 1973 Term,* 88 HARV. L. REV. 41, 125 n.41 (1974).

[104] Several commentators have written about the emergence of an intermediate standard of review. *See, e.g.,* Goodpaster, *The Constitution and Fundamental Rights,* 15 ARIZ. L. REV. 450 (1973); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications,* 62 GEO. L.J. 1071 (1974). However, the intermediate standard of review identified by the commentators has never been expressly recognized by the Court. Only Justice Marshall, in dissenting opinions, has advocated the adoption of a "spectrum of standards . . . that clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending . . . on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (dissenting opinion); *accord,* Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (dissenting opinion). For an argument against the recognition of an intermediate standard of review, see Barrett, Jr., *Judicial Supervision of Legislative Classifications—a More Modest Role for Equal Protection?* 1976 B.Y.U.L. Rev. 89.

[105] In Reed v. Reed, 404 U.S. 71, 76 (1971) (sex discrimination), the Court articulated what has come to be regarded as an intermediate standard of review: "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . .'"

[106] Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973) was the first case to strike down a guest statute. After explicitly rejecting the two classic standards of review, the California court adopted the *Reed* test and concluded that it could find no "fair and substantial relation" between the objectives of protecting hospitality or preventing collusive lawsuits and the guest statute's distinctions between 1) automobile guests and paying passengers; 2) automobile guests and other social guests; and 3) automobile guests exempted from the statute and those subject to the operation of the statute. In determining the rationality of these legislative classifications, the court evaluated both the purported objectives of the statute and the means of achieving these objectives in light of its prior common law decisions. The case has therefore been criticized for promoting tort policy at the expense of established constitutional principle. Comment, *Judicial Activism in Tort Reform: The Guest Statute Exemplar and a Proposal for Comparative Negligence,* 21 U.C.L.A.L REV. 1566 (1974); Sidle v. Majors —— Ind. ——, 341 N.E.2d 763 (1976); Eleven jurisdictions have refused to follow California's lead, in *Brown* upholding their guest statutes against equal protection challenges and generally applying the lower of the two classic standards of review, as was done in Silver v. Silver, 280 U.S. 117 (1929) (upholding Connecticut guest statute). Sidle v. Majors, 536 F.2d 1156 (2d Cir. 1976) (Indiana law); Beasley v. Bozeman, 294 Ala. 288, 315 So. 2d 570 (1975); White v. Hughes, 257 Ark. 627, 519 S.W.2d 70 (1975), *appeal dismissed,* 96 S. Ct. 15 (1975); Richardson v. Hansen, 186 Colo. 346, 527 P.2d 536 (1974); Justice v. Gatchell, 325 A.2d 97 (Del. 1974); Furthermore, the California supreme court has recently taken the position that *Brown* did not depart from the two traditional equal protection standards. *Schwalbe v. Jones,* 16 Cal. 3d 514, 518 n.2, 546 P.2d 1033, 1035 n.2, 128 Cal. Rptr. 321, 323 n.2 (1976); Keasling v. Thompson, 217 N.W.2d 687 (Iowa 1974); Botsch v. Reisdorff, 193 Neb. 165, 226 N.W.2d 121 (1975); Tisko v. Harrison, 500 S.W.2d 565 (Tex. Civ. App. 1973); Cannon v. Oviatt, 520 P.2d 883 (Utah 1974), *appeal dismissed,* 419 U.S. 810 (1974); Annot., 66 A.L.R.3d 532, § 4 (1975). Two of the nine jurisdictions have upheld their guest statutes under the *Reed* test. Duerst v. Limbocker, 269 Ore. 252, 525 P.2d 99 (1974); Behrens v. Burke, —— S.D.

Assuming the existence of an intermediate standard of review, counsel for the plaintiff would have to justify its invocation.[107] Counsel could contend that the "death-injury" classification burdens the interest of a parent or child in receiving compensation for the loss of the other's society and companionship, and that this interest is closely associated with the constitutionally protected right to privacy.[108] Several Supreme Court cases can be cited in support of this position. However, none of them is directly in point and some of them were decided under the due process, rather than the equal protection, clause. Thus in *Roe v. Wade,*[109] the Court stated that the right to privacy has "some extension to activities" pertaining to family relationships,[110] child rearing and education,[111] marriage,[112] and procreation.[113] In *Stanley v. Illinois,*[114] the Court noted that it had "frequently emphasized the importance of the family" and the "integrity of the family unit."[115] Accordingly, it held that the "interest of a parent in the companionship, care, custody, and management of his or her children" "undeniably warrants deference and, ab-

——, 229 N.W.2d 86 (1975). But seven highest state courts have followed the California supreme court by holding that their guest statutes deny equal protection. These decisions generally apply the *Reed* standard of review and adhere to the reasoning of *Brown v. Merlo.* Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974); Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974); Manistee Bank & Trust Co. v. McGowan, 394 Mich. 655, 232 N.W.2d 636 (1975); Laakonen v. Eighth Judicial Dist. Ct., —— Nev. ——, 538 P.2d 574 (1975); McGeehan v. Bunch, —— N.M. ——, 540 P.2d 238 (1975); Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974); Primes v. Tyler, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975); Annot., 66 A.L.R.3d 533, § 5 (1975). These guest statute cases are important not only because they use the *Reed* test as an intermediate standard of review, but also because they illustrate the potential impact of constitutional principles in effecting tort law reform.

[107] *See* Justice Marshall's dissenting opinion in San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973), as quoted in note 103 *supra.*

[108] The term "right to privacy" is a somewhat misleading, but generally accepted term of art used to describe a cluster of diverse, constitutionally-protected interests, including those associated with the parent-child relationship. *See* Fitzgerald v. Porter Mem. Hosp., 523 F.2d 716, 719-20 (7th Cir. 1975). The Constitution of the United States "does not explicitly mention any right of privacy." Roe v. Wade, 410 U.S. 113, 152 (1973). However, the Court has found a "guarantee of certain areas or zones of privacy" in the first, third, fourth, fifth, and ninth amendments, in the penumbras of the Bill of Rights, and in the concept of liberty guaranteed by the first section of the fourteenth amendment. Roe v. Wade, 410 U.S. 113, 152-53 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). Several state constitutions now explicitly recognize a right of privacy. *See, e.g.,* ALAS. CONST. art. 1, § 22; CAL. CONST. art. 1, § 1.

[109] 410 U.S. 113, 152-53 (1973) (abortion).

[110] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[111] Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[112] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[113] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[114] 405 U.S. 645, 651 (1972) (unmarried father's right to hearing on his fitness as a parent in a dependency proceeding).

[115] *Id.*

sent a powerful countervailing interest, protection"[116] And, in *Levy v. Louisiana*[117] and *Glona v. American Guarantee & Liability Ins. Co.*,[118] the Court stressed the importance of allowing compensation for an indirect interference with the parent-child relationship. It applied at least an intermediate standard of review in striking down legislation that barred the recovery of wrongful death damages by both an illegitimate child and the parent of an illegitimate child. These Supreme Court decisions provide some basis for contending that the interest in obtaining compensation for the loss of an injured parent's or child's society and companionship is so closely related to the interests protected by the right of privacy that the "death-injury" classification created by wrongful death statutes ought to be subjected to an intermediate standard of review.[119]

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116 *Id. Accord,* In re B., 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972); In re Welfare of Myricks, 85 Wash. 2d 252, 533 P.2d 841 (1975).

117 391 U.S. 68 (1968) (wrongful death action by illegitimate children).

118 391 U.S. 73 (1968) (wrongful death action by mother of illegitimate son).

119 It might also be suggested that an intermediate standard of review would be appropriate because the "death-injury" classification burdens the interest in recovering compensatory tort damages, which could be characterized as an interest closely related to the fourteenth amendment's guarantee that no state shall "deprive any person of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. XIV, § 1. *See* Brown v. Merlo, 8 Cal. 3d 855, 862 n.2, 506 P.2d 212, 216 n.2, 106 Cal. Rptr. 388, 392 n.2 (1973) (summarily rejecting argument that the right to sue in tort is a "fundamental interest") (holding guest statute unconstitutional on other grounds); Thompson v. Hagen, 96 Idaho 19, 21 n.12, 523 P.2d 1365, 1367 n.12 (1974) (reserving the question of whether the right to sue in tort is fundamental) (holding guest statute unconstitutional on other grounds). This argument might be particularly appealing in a jurisdiction whose state constitution provides that there shall be a remedy for every wrong. *E.g.*, FLA. CONST. art. I, § 21; ILL. CONST. art. 1, § 12. Such a constitutional provision has the advantage of being more specific than the due process clause of the United States Constitution. *See* New York Cent. R.R. v. White, 243 U.S. 188 (1917) (upholding worker's compensation legislation against a due process challenge); Montgomery v. Daniels, 38 N.Y.2d 41, 340 N.E.2d 444, 378 N.Y.S.2d 1 (1975) (upholding no-fault legislation against a due process challenge). However, even in a jurisdiction with this type of specific constitutional guarantee of redress, it is unlikely that the court will accord it great weight. Such provisions have generally been construed solely as a guarantee that the legislature will not abolish a common law remedy existing at the time the constitution was adopted. They have not been construed to preclude a modification of the remedy, provided the modification is an adequate substitute. *Compare* Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974) (upholding Florida's no-fault legislation "modifying" the common law remedy for personal injuries) *with* Kluger v. White, 281 So. 2d 1 (Fla. 1973) (striking down Florida's no-fault legislation "abolishing" the common law remedy for property damage because no-fault coverage for such damage was not made compulsory). More importantly, they have not been construed as a mandate to create new causes of action. *See, e.g.*, Lockwood v. Wilson H. Lee Co., 144 Conn. 155, 128 A.2d 330 (1956) (wife denied right to recover for loss of consortium); Nash v. Baker, 522 P.2d 1335 (Okla. App. 1974) (child denied right to recover for alienation of parent's affections). For these reasons, it is dubious that such state constitutional provisions would persuade a court to shift from the lower of the two classic standards of review to an intermediate standard of review in judging the "death-injury" classification drawn by wrongful death legislation.

If an intermediate standard of review is appropriate, the next question is whether the "death-injury" classification rests "upon some ground of difference having a *fair and substantial* relation to the object of the legislation?"[120] In the three cases considering the constitutionality of the classification under the rational basis test, it was held that "the Legislature could rationally conclude that only on the parent's death should intangible losses to a child become actionable"[121] because a child is "totally deprived of parental benefits when the parent is killed but not, except in unusual cases, when he survives."[122] These cases seem to be premised on the assumption that one of the objectives of wrongful death legislation is to compensate for lost society and companionship. However, they apparently conclude that the "death-injury" classification is reasonable because it guarantees that only those persons with *unquestionably* genuine claims (*i.e.,* those persons who have suffered a total loss) will be entitled to compensation. This argument might suffice under the lower of the two classic standards of review,[123] but does it satisfy the *Reed* test? Or is the "death-injury" classification so restrictive in its identification of "genuine claims" that it is fatally underinclusive[124] when judged by an intermediate standard of review? Consider, for example, cases in which the injured person is "among the living dead."[125] Surely the parents or children of such primary tort victims have sustained a genuine loss of society and companionship. Furthermore, in other contexts, courts have acknowledged the importance of safeguarding against compensation for spurious claims, but have held that this justification for an allegedly discriminatory classification would not withstand judicial scrutiny under the intermediate standard of review.[126] These cases are persuasive authority for invalidating the "death-injury" classification, despite its purported objective of assuring that only genuine claims are compensated.

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120 Reed v. Reed, 404 U.S. 71, 76 (1971) (emphasis added).

121 Suter v. Leonard, 45 Cal. App. 3d 744, 748, 120 Cal. Rptr. 110, 113 (1975).

122 Russell v. Salem Transp. Co., 61 N.J. 502, 508, 295 A.2d 862, 865 (1972); *accord,* Garza v. Kantor, 54 Cal. App. 3d 1025, 127 Cal. Rptr. 164 (1976).

123 *See* note 102 *supra.*

124 For an excellent discussion of the concepts of underinclusiveness and overinclusiveness with respect to legislative classifications, see Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341, 344-53 (1949).

125 *E.g.,* General Elec. Co. v. Bush, 88 Nev. 360, 498 P.2d 366 (1972); Erhardt v. Havens, Inc., 53 Wash. 2d 103, 330 P.2d 1010 (1958).

126 *E.g.,* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 174-75 (1972) (allowing recovery of workmen's compensation benefits by illegitimate, dependent children of deceased worker); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 76 (1968) (allowing recovery of wrongful death damages by mother of illegitimate child, despite fact that "[o]pening the courts to suits of this kind may conceivably be a temptation to some to assert motherhood fraudulently").

Another possible basis for justifying the classification would be the ground that there is a danger of double recovery in cases of injury, a danger not present in cases of death.[127] There is little merit to this contention, however. As the courts have noted in actions for loss of consortium,[128] the primary tort victim recovers for his or her pain and suffering, whereas the secondary tort victim sues for the loss of the injured person's society and companionship—a loss that is personal to the secondary tort victim. Thus there should be no problem of double recovery in actions for lost society and companionship. To eliminate the risk of double recovery because of a jury's failure to follow the judge's instructions, joinder of the two causes of action could be required.[129] Given the ease with which this risk can be avoided, it is unlikely that a court applying an intermediate standard of review would find that it justifies the "death-injury" classification drawn by the legislature.

2. Loss of Spouse's vs. Parent's or Child's Society and Companionship

The second classification, which has been drawn by both legislatures and courts,[130] makes damages for lost society and companionship recoverable by a spouse, but not by a parent or child of an injured person. Once again, the interest burdened by the classification is closely related to the constitutional right to privacy.[131] Accordingly, the application of an intermediate standard of review could be urged upon a federal or state court reviewing a legislative classification or a federal court reviewing a state court classification.[132] If the reviewing court were scrutinizing its own classification, the following passage from *Deems v. Western Maryland Railway Co.* suggests that an intermediate standard of review might be even more appropriate:

> When this court is asked to examine a legal doctrine which it has laid down in past decisions in light of a constitutional claim not previously raised, our function is somewhat different than it is when the constitutionality of a statute is attacked. In the latter situation, there is the presumption of the validity of the legislative enactment.

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127 Suter v. Leonard, 45 Cal. App. 3d 744, 747, 120 Cal. Rptr. 110, 112 (1975).

128 *E.g.*, Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974); Diaz v. Eli Lilly & Co., 364 Mass. 153, 302 N.E.2d 555 (1973).

129 *See* text accompanying notes 77-81 *supra.*

130 *See* note 20 *supra.*

131 *See* text accompanying notes 106-17 *supra.* An intermediate standard of review also might be appropriate on the theory that the classification burdens the plaintiff's interest in recovering compensatory tort damages. *See* note 118 *supra.*

132 Most of the cases challenging the constitutionality of state court rulings allowing husbands, but not wives, to recover for loss of consortium were litigated in federal courts. *See* cases cited note 136 *infra.*

> The action reviewed is that of a separate depository of the sovereign power. When a court must view its own decisions, the action is one of self-examination.[133]

Of course, a court faced with its own classification could avoid deciding the constitutional question altogether. Nevertheless, it still might rely upon equal protection considerations to justify the exercise of its common law power to recognize a new cause of action.[134]

Assuming that the application of an intermediate standard of review is appropriate, does the classification satisfy the *Reed* test?[135] Courts in several jurisdictions have recognized a wife's action for loss of consortium, but have denied a parent's or child's action for lost society and companionship, either in the same case or in one litigated shortly thereafter.[136] These courts have focused on one principal distinction between the two actions: In actions by a spouse, damages are recoverable for *sex,* society and companionship, whereas in actions by a parent or child, the sexual component is missing. An analogous "missing component" argument was advanced when wives sought to invoke the equal protection guarantee to establish their right to recover for loss of consortium.[137] Defense counsel contended that the "male-female" clas-

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[133] 247 Md. 95, 102, 231 A.2d 514, 518 (1967) (overruled prior decisions holding that wife could not recover for loss of consortium); *accord,* Leffler v. Wiley, 15 Ohio App. 2d 67, 239 N.E.2d 235 (1968).

[134] *E.g.,* Deems v. Western Md. Ry., 247 Md. 95, 106-107, 113, 231 A.2d 514, 520-21, 524 (1967); Millington v. Southeastern Elev. Co., 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968).

[135] *See* note 104 *supra.*

[136] *See* cases cited note 22 *supra.* In one of these cases, the court upheld the classification against an equal protection challenge, apparently applying the lower of the two traditional standards of review, and holding that minor children are not "situated similarly to the spouses to whom a cause of action for consortium is accorded." Garza v. Kantor, 54 Cal. App. 3d 1025, 1028, 127 Cal. Rptr. 164, 166 (1976).

[137] *E.g.,* Duncan v. General Motors Corp., 499 F.2d 835 (10th Cir. 1974) (allowing recovery; Oklahoma law); Miskunas v. Union Carbide Corp., 399 F.2d 847 (7th Cir. 1968), *cert. denied,* 393 U.S. 1066 (1969) (denying recovery; Indiana law); Karczewski v. Baltimore & Ohio R.R., 274 F. Supp. 169 (N.D. Ill. 1967) (allowing recovery; Illinois law) (disapproved in *Miskunas*); Owen v. Illinois Baking Corp., 260 F. Supp. 820 (W.D. Mich. 1966) (allowing recovery; Indiana law) (disapproved in *Miskunas*); Gates v. Foley, 247 So. 2d 40 (Fla. 1971) (allowing recovery); Berghammer v. Smith, 185 N.W.2d 226, 233 (Iowa 1971) (allowing recovery; Minnesota law; dictum); Leffler v. Wiley, 15 Ohio App. 2d 67, 239 N.E.2d 235 (1968) (allowing recovery); Umpleby v. Dorsey, 10 Ohio Misc. 288, 227 N.E.2d 274 (C.P. Stark Co. 1967) (allowing recovery); Clem v. Brown, 3 Ohio Misc. 167, 207 N.E.2d 398 (C.P. Paulding Co. 1965) (allowing recovery); Hopkins v. Blanco, 457 Pa. 90, 320 A.2d 139 (1974) (allowing recovery); Krohn v. Richardson-Merrell, Inc., 219 Tenn. 37, 406 S.W.2d 166 (1966), *cert. denied* 386 U.S. 970 (1967) (denying recovery); Seagraves v. Legg, 147 W. Va. 331, 127 S.E.2d 605 (1962) (denying recovery). In all jurisdictions shown above as denying recovery, wives may now sue for loss of consortium as the result of a statute or more recent judicial decision. *See* note 20 *supra.* For a discussion of the cases cited above, see Clark, *The Wife's Action for Negligent Impairment of Consortium,* 54 IOWA L. REV. 510 (1968);

sification was rational because only husbands could recover for loss of *services,* sex, society, and companionship.[138] Several courts rejected this contention, holding that both spouses are equally entitled to damages for loss of the intangible aspects of the marital relationship,[139] and that the husband's right to recover for additional, pecuniary losses did not justify the classification. It could also be argued that the underlying value protected in actions for loss of consortium and lost society and companionship is the ability of family members to function normally in relationship to one another. The varying ways in which familial closeness is expressed are but indicia of this underlying value. Therefore, spouses, parents and children should be equally entitled to damages for the loss of familial society and companionship. It ought to be totally irrelevant that spouses are additionally entitled to recover for the loss of a partner's sexual capacity.[140]

3. Summary

In conclusion, the success of the equal protection argument will depend in large measure upon the standard of review adopted. It is unlikely that a court would apply strict scrutiny. However, assuming the existence of an intermediate standard of review, its application appears proper on the ground that the classifications created by actions for wrongful death or loss of consortium impose a burden on an interest that is closely related to the constitutionally protected right to privacy—the interest in receiving compensation for the loss of an injured parent's or child's society and companionship. If an intermediate standard of review is applied, a court might invalidate the "death-injury" classification. While this classification eliminates the dangers of spurious claims and double recovery, it is underinclusive and bears no "fair and substantial relation" to the objective of compensating for lost society and companionship. Similarly, the distinction between "consortium" and "society and companionship" might not withstand judicial scrutiny under an intermediate standard of review. In any event, counsel for

Comment, *Duncan v. General Motors Corp.: Equal Protection and the Wife's Right to Recover for Loss of Consortium,* 1974 UTAH L. REV. 830.

[138] *E.g.,* Karczewski v. Baltimore & Ohio R.R., 274 F. Supp. 169, 172 (N.D. Ill. 1967); Clem v. Brown, 3 Ohio Misc. 167, 207 N.E.2d 398 (C.P. Paulding Co. 1965).

[139] *E.g.,* Duncan v. General Motors Corp., 499 F.2d 835, 838 (10th Cir. 1974); Karczewski v. Baltimore & Ohio R.R., 274 F. Supp. 169, 179-80 (N.D. Ill. 1967); Gates v. Foley, 247 So. 2d 40, 43-45 (Fla. 1971); Clem v. Brown, 3 Ohio Misc. 167, 207 N.E.2d 398 (C.P. Paulding Co. 1965).

[140] *See* Hair v. County of Monterey, 45 Cal. App. 3d 538, 119 Cal. Rptr. 639 (1975) (dictum). *But see* Garza v. Kantor, 54 Cal. App. 3d 1025, 127 Cal. Rptr. 164 (1976) (upholding classification).

the plaintiff ought not to overlook the equal protection considerations discussed in this section. Even if not dispositive, when coupled with the policy considerations set forth in the preceding section, they might persuade the court to depart from precedent and allow recovery for lost society and companionship.

III. Nature and Contours of the Cause of Action

Once a court or legislature decides to allow compensation for the loss of an injured parent's or child's society and companionship, it must then shape the contours of the cause of action. In fact, some courts and legislatures may have shied away from giving relief in appealing cases simply to avoid the real or imaginary problems associated with this task. However, the following discussion suggests that a more reasoned response is possible.

A. *Nature of the Interest Protected*

At the outset, it will be necessary to define the nature of the interest protected by the cause of action. The Wisconsin supreme court identified the recoverable items of damage as the "aid, comfort, society, and companionship" of an injured child.[141] A California intermediate appellate court indicated that it would permit a parent to recover for the "pleasure, society, comfort and companionship" of an injured child.[142] An Iowa statute authorizes a parent to bring an action for lost "society and companionship"[143] while the Washington legislature, in a somewhat more expansive statute, allows damages for "the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship."[144] In actions by children, plaintiffs have requested relief for lost "aid, comfort and companionship"[145] or "society, care, protection, support and affection."[146] In a most comprehensive al-

[141] Shockley v. Prier, 66 Wis. 2d 394, 401, 225 N.W.2d 495, 499 (1975). For a discussion of this case, see text accompanying notes 5-7 *supra*.

[142] Hair v. County of Monterey, 45 Cal. App. 3d 538, 545, 119 Cal. Rptr. 639, 644 (1975). For a discussion of this case, *see* text accompanying notes 8-12 *supra*.

[143] Iowa Code Ann. Rule Civ. Pro. 8 (Supp. 1974). *See also* Idaho Code Ann. §§ 5-310 to -311 (Supp. 1975), *as construed by* Hayward v. Yost, 72 Idaho 415, 242 P.2d 971 (1952).

[144] Wash. Rev. Code Ann. § 4.24.010 (Supp. 1975). In Wilson v. Lund, 80 Wash. 2d 91, 491 P.2d 1287 (1971) (wrongful death action), the court construed the Washington statute as allowing recovery for two separate items of damage: (1) "companionship"; and (2) "loss of love . . . and . . . injury to or destruction of the parent-child relationship." The latter item was construed as providing recovery for "parental grief, mental anguish and suffering . . . ." *Id.* at 96, 491 P.2d at 1290.

[145] Russell v. Salem Transp. Co., 61 N.J. 502, 504, 295 A.2d 862, 863 (1972) (recovery denied).

[146] Suter v. Leonard, 45 Cal. App. 3d 744, 745, 120 Cal. Rptr. 110, 111 (1975) (recovery denied).

legation, one child claimed that he had been "deprived . . . of the family relationship" and had sustained the "loss of companionship and association, the care, attention, kindness, maternal guidance, comfort and solace of his mother's society."[147] The common denominator in all these characterizations of the nature of the interest protected is "lost society and companionship."

While lawyers are often accused of using two words where one would suffice (a practice not likely to be discontinued in drafting complaints), jury instructions and statutory enactments could be confined to the use of one or two words which would capture the essence of the intangible loss sustained.[148] Such restraint might avert any potential danger that juries would increase the amount of the verdict in direct proportion to the amount of verbiage used to describe the alleged loss. The most comprehensive definition of the loss would be "injury to the parent-child relationship." Terms such as "loss of society and companionship" or "loss of love and companionship," though narrower, would emphasize the intangible nature of the loss.

B. *Persons Entitled to Bring Action*

At first glance, the designation of the persons entitled to bring an action for lost society and companionship might appear to be a relatively simple task. In the case of an injured child, the parent is the proper plaintiff; when it is the parent who has been injured, the child is entitled to recover damages. But what if the injured child has more than one parent, or if the injured parent has several children? What if the plaintiff is either an adopted, illegitimate or stepchild, or the parent of such a child? And should damages be recoverable only by a minor, or a minor's parents? Or should the right of action extend into adulthood?

In *Shockley v. Prier*,[149] the injured child's parents filed separate causes of action in a joint complaint, and in *Hair v. County of Monterey*,[150] the parents joined as plaintiffs in a single cause of action. But it is unusual for both parents to bring suit for lost society and companionship. More commonly, the father alone sues,[151] or, in the event

147 Hankins v. Derby, 211 N.W.2d 581, 581-82 & n.5 (Iowa 1973).

148 *E.g.*, Shockley v. Prier, 66 Wis. 2d 394, 404, 225 N.W.2d 495, 500 & n.5 (1975) (recommends use of instruction directing the jury to determine "what sum will reasonably compensate the plaintiff for the loss of society and companionship" of a child).

149 66 Wis. 2d 394, 395-96, 225 N.W.2d 495, 497 (1975).

150 45 Cal. App. 3d 538, 540, 119 Cal. Rptr. 639, 640 (1975).

151 *E.g.*, Smith v. Richardson, 277 Ala. 389, 171 So. 2d 96 (1965) (recovery denied); Butler v. Chrestman, 264 So. 2d 812 (Miss. 1972) (recovery denied); Beyer v. Murray,

of the father's death or desertion, the mother brings the action.[152] This practice is undoubtedly a reflection of the rules governing actions by a parent for the loss of an injured child's services. In such actions, the majority of jurisdictions continue to follow the established view that the right of action for lost services belongs to the father as long as he has the legal obligation to support the child and is fulfilling that obligation.[153] Only in the event of the father's death or desertion does the mother have a right to sue for lost services.[154] The theory behind the majority view is that the parent with the primary obligation of support is the one entitled to the child's services.[155]

In some jurisdictions, however, often in response to legislation giving both parents equal rights and duties regarding their children, an action for lost services may be brought by either parent.[156] To avoid a multiplicity of suits, most of those jurisdictions require joinder of both parents whenever feasible.[157] Joinder is unquestionably mandated

33 App. Div. 2d 246, 306 N.Y.S.2d 619 (1970) (recovery denied); White v. City of New York, 322 N.Y.S.2d 920, 37 App. Div. 2d 603 (1971) (recovery denied).

152 Gilbert v. Stanton Brewery, Inc., 295 N.Y. 270, 67 N.E.2d 155 (1946) (recovery denied); Foti v. Quittel, 241 N.Y.S.2d 15, 19 App. Div. 2d 635 (1963) (recovery denied); Quinn v. City of Pittsburgh, 243 Pa. 521, 90 A. 353 (1914) (recovery denied); McGarr v. National & Providence Worsted Mills, 24 R.I. 447, 53 A. 320 (1902) (excellent discussion) (recovery denied).

153 *E.g.*, Ackeret v. City of Minneapolis, 129 Minn. 190, 151 N.W. 976 (1915) (father not required to join mother in action for loss of child's services); Keller v. City of St. Louis, 152 Mo. 596, 54 S.W. 438 (1899) (divorced mother with custody of child denied right to sue for lost services of her son where father was obligated to provide child support); Whitley v. Hix, 207 Tenn. 683, 343 S.W.2d 851 (1961) (father not required to join mother in action for loss of child's services); Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942) (father was necessary party to action for lost services by mother and stepfather where neither divorce nor father's failure to support child had been shown). *See generally* 1 F. HARPER & F. JAMES, *supra* note 18 at § 8.8, at 630 n.1; W. PROSSER, *supra* note 3, at § 125, at 890-91; RESTATEMENT OF TORTS § 703, Comment *e* (1938).

154 *E.g.*, Southwestern Gas & Elec. Co. v. Denney, 190 Ark. 934, 82 S.W.2d 17 (1935) (mother was proper plaintiff where father deserted and divorce decree awarded her care, custody and control of child); Martin v. City of Butte, 34 Mont. 281, 86 P. 264 (1906) (mother's complaint dismissed for failure to allege father's death); Thoreson v. Milwaukee & Suburban Transp. Co., 56 Wis. 2d 231, 201 N.W.2d 745 (1972) (divorced mother with custody of child was proper plaintiff where father's support payments over preceding eight years averaged $1 per week).

155 *E.g.*, Keller v. City of St. Louis, 152 Mo. 596, 54 S.W. 438 (1899); Smith v. Hewett, 235 N.C. 615, 70 S.E.2d 825 (1952); McGarr v. National & Providence Worsted Mills, 24 R.I. 447, 53 A. 320 (1902).

156 *E.g.*, ARIZ. REV. STAT. ANN. § 12-641 (Supp. 1975); IOWA CODE ANN. RULE CIV. PRO. 8 (Supp. 1974); MISS. CODE ANN. § 93-13-1 (1972), *as construed in* Wright v. Standard Oil Co., 470 F.2d 1280 (5th Cir. 1972); N.Y. DOM. REL. LAW. § 81 (McKinney Supp. 1975), *as construed in* Liebler v. Our Lady of Victory Hosp., 43 App. Div. 2d 898, 351 N.Y.S.2d 480 (1974) (both parents must prove that they in fact contributed to child's support).

157 *E.g.*, CAL. CIV. PRO. CODE § 376 (West 1973) (not required if one parent is dead, cannot be found, or refuses to join); IDAHO CODE ANN. § 5-310 (Supp. 1975) (not required if one parent is dead or has abandoned family); KY. REV. STAT. ANN. § 405.010 (1972)

when the parents are married to each other and living together,[158] but it may also be required when they are divorced.[159] This requirement accords with the philosophy that both parents have rights and obligations regarding the care and support of a minor child. Since both parents are "equal in the eyes of the law"[160] (either as a matter of public policy or pursuant to state[161] or federal[162] constitutional provisions), both parents have an interest in the action for the loss of their injured child's services. The minority view allowing either parent to sue for lost services reflects modern trends in the law governing women's rights.[163] It is also consistent with recent legislation permitting either parent to sue for wrongful death damages.[164] Indeed, it has been held that a wrongful death statute barring a mother's suit except in the event of the father's death, desertion, or imprisonment violates the equal protection guarantees of both the state and federal constitutions.[165]

Given these considerations, it can be expected that the minority view will be adopted by an increasing number of jurisdictions. But

(not required if one parent is dead, has abandoned the child, or has been deprived of its custody by judicial decree); ME. REV. STAT. ANN. tit. 19, § 212 (1965) (not required if one parent refuses to sue); MD. ANN. CODE art. 72A, §§ 2-3 (Supp. 1975) (not required if one parent is dead, has abandoned the child, or been deprived of its custody by judicial decree); N.J. STAT. ANN. § 9:1-1 (1960) (not required if one parent is dead, has abandoned the child, has been deprived of its custody by judicial decree, or refuses to sue); WASH. REV. CODE ANN. § 4.24.010 (Supp. 1975) (parent bringing suit must serve notice that the other parent must join within twenty days or be barred from recovery). *See also* Yordan v. Savage, 279 So. 2d 844 (Fla. 1973) (both parents living together are necessary parties; if one sues, must either file as trustee for other parent or name other parent as a party defendant); PA. STAT. ANN. tit. 48, § 91 (1965) (either parent has right to sue, but must bring action in the name of both as long as both parents are living together).

158 *E.g.*, Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Yordan v. Savage, 279 So. 2d 844 (Fla. 1973).

159 *E.g.*, Hunt v. Yeatman, 264 F. Supp. 490 (E.D. Pa. 1967) (not clear whether separated parents still have "single cause of action") (dictum). In California and Washington, statutes requiring joinder recognize no exception for parents who are divorced. CAL. CIV. PRO. CODE § 376 (West 1973); WASH. REV. CODE ANN. § 4.24.010 (Supp. 1975).

160 Yordon v. Savage, 279 So. 2d 844, 846 (Fla. 1973).

161 *Id.*

162 Wright v. Standard Oil Co., 470 F.2d 1280, 1293 (5th Cir. 1972) (notes, without discussing, alleged violation of federal equal protection clause); Yordon v. Savage, 279 So. 2d 844, 846 (Fla. 1973) (relies on both state and federal equal protection guarantees).

163 *See generally* Ginsburg, *Gender and the Constitution*, 44 U. CINN. L. REV. 1 (1975).

164 *E.g.*, ALASKA STAT. § 09.15.010 (Supp. 1974); IOWA CODE ANN. RULE CIV. PRO. 8 (Supp. 1974); IND. ANN. STAT. § 34-1-1-8 (Supp. 1975) (joinder required); WASH. REV. CODE ANN. § 4.24.010 (Supp. 1975) (joinder required).

165 Kinslow v. Cook, —— Ind. App. ——, 333 N.E.2d 819 (1975) (action by both parents for death of minor son). The court refused to recognize either the danger of double recovery or the father's primary responsibility to support the child as a rational basis for upholding the classification based on sex. It then deleted the constitutionally offensive words from the statute, thereby authorizing suit by either the father or the mother, or by both of them joined in a single action.

these are not the only reasons that a similar rule should be applied in suits for lost society and companionship. It may be plausible to argue that the right to a child's services is a *quid pro quo* for the parental duty to support, and that therefore only the parent with the primary support obligation should be entitled to sue for lost services.[166] But no court has yet suggested that there is a comparable nexus between the right to a child's society and companionship and the parental support obligation. Absent such a nexus, it would seem that both parents should be equally entitled to bring an action for the loss of an injured child's society and companionship,[167] and that joinder should be required whenever feasible in order to avoid a multiplicity of suits.[168]

Because many families have more than one child, the danger of a multiplicity of suits is even greater in actions for the loss of an injured parents's society and companionship.[169] The problem has not actually surfaced in the reported cases because each of them has been brought by a guardian ad litem or next friend suing on behalf of all the minor children of the injured parent in a single complaint.[170] Nevertheless, the problem is a real one.[171] Again, it could be solved by requiring joinder of all children in a single cause of action,[172] following the precedent established in those jurisdictions that require joinder of all persons entitled to recover under wrongful death legislation.[173]

Until now, this discussion has assumed that the claimant would be a natural parent or a natural child. Presumably there would be no question as to the right of an adoptive parent or an adopted child to sue for lost society and companionship.[174] But what if the plaintiff or

166 *See* RESTATEMENT OF TORTS § 703, Comment *e* (1938). *But see* Kinslow v. Cook, —— Ind. App. ——, 333 N.E.2d 819 (1975).

167 *E.g.*, Williams v. Legree, 206 So. 2d 13 (Fla. App. 1968) (mother separated from father who refused to bring wrongful death action was allowed to bring action for "mental pain and suffering").

168 *See* text accompanying notes 156-58 *supra*. *See also* FED. R. CIV. PRO. 19. For a discussion of the operation of Rule 19, *see* 3A J. MOORE, FEDERAL PRACTICE ¶¶ 19.05-07.2, 19.19 (2d ed. 1974).

169 *See* text accompanying notes 82-83 *supra*.

170 *E.g.*, Hoffman v. Dautel, 189 Kan. 165, 368 P.2d 57 (1962) (recovery denied); Duhan v. Milanowski, 75 Misc. 2d 1078, 348 N.Y.S.2d 696 (1973) (semble).

171 The problem would be particularly troublesome in actions brought by both minor and adult children of an injured parent, or by more than one guardian ad litem or next friend.

172 *See* Duhan v. Milanowski, 75 Misc. 2d 1078, 1083, 348 N.Y.S.2d 606, 702 (1973). *See also* FED. R. CIV. PRO. 19.

173 *E.g.*, Watkins v. Nutting, 17 Cal. 2d 490, 110 P.2d 384 (1941); Nelms v. Bright, 299 S.W.2d 483 (Mo. 1957); Truesdill v. Roach, 11 Wis. 2d 492, 105 N.W.2d 871 (1960). *See generally* S. SPEISER, *supra* note 24, at § 11.42.

174 *See* Pickle v. Page, 252 N.Y. 474, 169 N.E. 650 (1930) (grandparents who had adopted child allowed to bring action for child's abduction). *See generally* H. CLARK, *supra* note 3, at §§ 18.1, 18.9; S. SPEISER, *supra* note 24, at §§ 10.6, 10.11.

the plaintiff's child were an illegitimate or a stepchild? Several recent Supreme Court decisions have struck down statutes discriminating against illegitimate children and their parents under the equal protection clause.[175] The most pertinent cases are those holding that it is a denial of equal protection to bar illegitimate children from recovering wrongful death damages[176] or workers' compensation benefits.[177] These cases suggest that there may be a constitutional mandate to allow the parties to an illegitimate parent-child relationship to recover for lost society and companionship.

The same mandate would not necessarily apply in actions by the parties to a stepparent-stepchild relationship. To date, the courts considering the constitutional question have distinguished stepchildren from illegitimate children on the ground that stepchildren do not have a biological relationship to the stepparent.[178] On the other hand, it could be argued that the status of a stepchild is as much "an accident of birth"[179] as that of an illegitimate child, thereby making the classification equally suspect under the equal protection clause. Until the Supreme Court resolves the question, the constitutional right of a stepparent or stepchild to bring an action for lost society and companionship will remain in doubt.[180] Meanwhile, courts and legislatures will have to determine whether, as a matter of social policy, to expand

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[175] *E.g.*, Jiminez v. Weinberger, 417 U.S. 628 (1974); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973). *Contra* Labine v. Vincent, 401 U.S. 532 (1971); Matthews v. Lucas, 96 S.Ct. 2755 (1976). *See generally* Gray & Rudovsky, *The Court Acknowledges the Illegitimate*, 118 U. PENN. L. REV. 1 (1969); Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967); Wallach & Tenoso, *A Vindication of the Rights of Unmarried Mothers and Their Children: An Analysis of the Institution of Illegitimacy, Equal Protection, and the Uniform Parentage Act*, 23 U. KAN. L. REV. 23 (1974); Annot., 38 A.L.R.3d 613 (1971).

In addition to these recent Supreme Court decisions, The Uniform Parentage Act, approved by the National Conference of Commissioners on Uniform State Laws in 1973, provides: "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." UNIFORM PARENTAGE ACT § 2. *See generally* Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1 (1974). The Act has been adopted (with some modifications to sections other than the one quoted above) by at least one jurisdiction. Ch. 1244, 1975 CAL. LEGIS. SERV. 3439-3447 (effective Jan. 1, 1976).

[176] Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968). *See generally* S. SPEISER, *supra* note 24, at §§ 10.4, 10.12.

[177] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

[178] *E.g.*, Dickerson v. Continental Oil Co., 449 F.2d 1209, 1217 (5th Cir. 1971) (applying Louisiana law) (stepchild does not qualify as "heir" under wrongful death statute); Steed v. Imperial Air Lines, 12 Cal. 3d 115, 524 P.2d 801, 115 Cal. Rptr. 329 (1974) (4-3 decision), *appeal dismissed*, 420 U.S. 916 (1975) (semble).

[179] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972) (allowing illegitimate child to recover worker's compensation benefits).

[180] Although the Court dismissed the appeal in Steed v. Imperial Airlines, 12 Cal. 3d 115, 524 P.2d 801, 115 Cal. Rptr. 329 (1974), *appeal dismissed* 420 U.S. 916 (1975), such a summary disposition has no binding precedential impact on the Court in a subsequent case. Edelman v. Jordan, 415 U.S. 651, 670-71 & n.13 (1974).

the potential class of plaintiffs in an action for lost society and companionship to include not only stepparents and stepchildren,[181] but also any other parties to an *in loco parentis* relationship.[182] A cogent argument can be made that recovery should be allowed because the loss of society and companionship will often be as great in this type of situation as in the case of an injury to a natural parent or child. The principal counter argument would be that subjecting the defendant to suit both by the parties to the *in loco parentis* relationship and by the natural parents or children would compound the danger of a multiplicity of suits. Although a joinder requirement would technically eliminate this concern,[183] the courts might understandably prefer to avoid the problems inherent in attempting to allocate damages equitably between such plaintiffs once joined.[184]

The decision in *Shockley v. Prier*[185] raises one final question regarding the identification of the persons entitled to bring an action for lost society and companionship. In *Shockley,* the court "confined" its opinion (at the plaintiff's request) "to the question of whether such damages are allowable to a parent during the minority of an injured child."[186] This suggests that a court might limit the persons entitled to bring suit to minors and their parents. Such a limitation has in fact been imposed upon actions for lost services[187] and, in some jurisdictions, upon wrongful death actions.[188] But in both types of actions,

[181] *See* Ch. 334, §§ 1-2, 1975 Cal. Legis. Serv. 846-47 (effective Jan. 1, 1976) (allowing recovery of wrongful death damages by dependent stepchildren and explicitly expressing an intent to "alter the rule of law enunciated in the decision of the California Court in Steed v. Imperial Air Lines (1974), 12 Cal. 3d 115."); Spiller v. Thomas M. Lowe, Jr. & Assoc., Inc., 466 F.2d 903 (8th Cir. 1972) (dependent stepchildren allowed to recover under federal maritime law in wrongful death action); Magnuson v. O'Dea, 75 Wash. 574, 135 P. 640 (1913) (stepfather who had supported stepchild was necessary party to natural mother's action for abduction of the child). *See generally* S. Speiser, *supra* note 24, at §§ 10.8, 10.13; Berkowitz, *Legal Incidents of Today's "Step" Relationship: Cinderella Revisited,* 4 Fam. L.Q. 209 (1970).

[182] Mobaldi v. Board of Regents of Univ. of Calif., 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976) (foster parents allowed to amend complaint to allege cause of action for lost society and companionship). *See* Peugh v. Oliger, 233 Ark. 281, 345 S.W.2d 610 (1961) (adult foster child allowed to recover wrongful death damages); Clark v. Bayer, 32 Ohio St. 299 (1877) (grandfather with custody pursuant to private agreement allowed to bring action for seduction of child). *See generally* Katz, *Legal Aspects of Foster Care,* 5 Fam. L.Q. 283 (1971).

[183] *See* notes 167 & 171-72 *supra* & text accompanying.

[184] For a discussion of the allocation of damages in an action for lost society and companionship, see section III.D. *infra.*

[185] 66 Wis. 2d 394, 225 N.W.2d 495 (1975).

[186] *Id.* at 396, 225 N.W.2d at 497.

[187] Parents are entitled to recover only for the loss of a minor's services. *E.g.,* Fletcher v. Taylor, 344 F.2d 92 (4th Cir. 1965); White v. Holding, 217 N.C. 329, 7 S.E.2d 825 (1940); Restatement of Torts § 703, Comment *h* (1938).

[188] Some of the jurisdictions that limit wrongful death damages to pecuniary losses only permit parents to recover for the death of a minor. *E.g.,* Mo. Stat. Ann. § 537.080 (Supp.

the crux of the suit is for a tangible loss (support or services) which is normally sustained only during a child's minority. In contrast, an action for lost society and companionship is brought strictly for an intangible loss that may be sustained irrespective of the age of the child. Thus, there is no logical reason why adult children and their parents ought to be precluded from suing for lost society and companionship.[189] As a matter of policy, however, some courts and legislatures may want to confine the potential class of plaintiffs to minor children and their parents.[190] This would limit the right to recover to those persons who are most apt to have sustained a genuine loss. On this basis, the distinction would perhaps withstand judicial scrutiny under the equal protection clause, at least if the lower standard of review were applied.[191]

C. *Measure of Damages*

Because the plaintiff in an action for lost society and companionship has sustained an intangible loss, there can be no precise measure of damages. Instead, the jury should be instructed to award a sum that will "reasonably compensate" the plaintiff for the past and future loss of the injured person's society and companionship.[192] The jury should also be instructed to take into account specific factors influencing the value of the lost society and companionship, such as the personality, disposition and character of the parent and child, their ages, the frequency of their interaction, and the intensity of the love and affection evident in the relationship between them.[193] These factors will be particularly influential when the child is an adult[194] or is not living

1974); N.M. STAT. ANN. § 22-20-3 (1954); S. SPEISER, *supra* note 24, at § 4.21. Conversely, adult children are often barred from recovery unless they offer special proof of pecuniary loss. *Id.* at § 4.20. *See generally* J. STEIN, DAMAGES AND RECOVERY § 260 (1972).

189 In several jurisdictions, adult children and their parents are allowed recovery for nonpecuniary losses in wrongful death actions. *E.g.*, Peugh v. Oliger, 233 Ark. 281, 345 S.W.2d 610 (1961) (wrongful death action by adult children, including foster child); Kelley v. Ohio River. R.R., 58 W. Va. 216, 52 S.E. 520 (1906) (wrongful death action by father of adult child).

190 *E.g.*, FLA. STAT. ANN. § 768.21 (4) (Supp. 1975) (parent of a deceased minor may recover for mental pain and suffering); IOWA CODE ANN. RULE CIV. PRO. 8 (Supp. 1974) (parents may sue for "lost society and companionship" of an injured minor). *See also* WASH. REV. CODE ANN. § 4.24.010 (Supp. 1975) (parents may sue for lost love and companionship of an injured minor or a child on whom either, or both, are dependent for support).

191 *E.g.*, Barrett v. Charlson, 18 Md. App. 80, 97 & n.10, 305 A.2d 166, 176 & n.10 (1973) (upholding constitutionality of wrongful death statute allowing only parents of minor children to recover for nonpecuniary losses). *See* section II.B. *supra.*

192 Shockley v. Prier, 66 Wis. 2d 394, 403 & n.5, 225 N.W.2d 495, 500 & n.5 (1975).

193 *Id.* Similar factors are taken into account in wrongful death actions for the death of a parent or child. *See* cases cited note 29 *supra.*

194 *See* cases cited note 188 *supra.*

with the parent.[195] In some jurisdictions, counsel also might be permitttd to make a "per diem" argument[196] to help the jury in assessing the value of this intangible loss.

Although there is no specific measure of damages for lost society and companionship, there is a limitation on the period of time for which such damages are recoverable. The maximum allowable period should be the shorter of the life expectancies of the parties to the parent-child relationship.[197] In those jurisdictions that decide to allow only minors and their parents to sue for lost society and companionship,[198] the jury should be instructed to award damages for the period of the child's minority or the parent's life expectancy, whichever is shorter.[199]

D. *Allocation of Damages*

A far more difficult problem is the allocation of damages among multiple plaintiffs. Of course, it will not arise if there is only a single parent or a single child to bring suit for the loss of the injured person's society and companionship. Nor will it arise if there are multiple potential plaintiffs, but each potential plaintiff brings a separate action. When the plaintiffs are joined in a single action,[200] however, a method will have to be devised for apportioning damages.

The problem of allocating damages among multiple plaintiffs is by no means peculiar to an action for lost society and companionship.

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195 *E.g.*, Fields v. Riley, 1 Cal. App. 3d 308, 81 Cal. Rptr. 671 (1969) (court upheld jury's decision to award father no wrongful death damages where mother had obtained interlocutory divorce decree, father had paid only $62 toward child's support, and father had rarely visited child); Lewis v. State, 176 So. 2d 718 (La. App. 1965) (mother who infrequently saw son awarded $1,500; father who lived with son awarded $7,500 in wrongful death action). *See generally* J. STEIN, DAMAGES AND RECOVERY § 255 (1972).

196 *E.g.*, Beagle v. Vasold, 65 Cal. 2d 166, 417 P.2d 673, 53 Cal. Rptr. 129 (1966). *See generally* 2 F. HARPER & F. JAMES, JR., THE LAW OF TORTS § 25.10 nn.4-5 (Supp. 1968); Annot., 60 A.L.R.2d 1347 (1958). Although the "per diem" argument has been used only to assist the jury in awarding damages for pain and suffering, it could also be employed to assess damages for other types of nonpecuniary losses.

197 *E.g.*, Bond v. United R.R. of S.F., 159 Cal. 270, 282, 113 P. 366, 371 (1911) (recovery allowed for "expectancy of life common to both the deceased and the beneficiary" in action for a minor's death); Barrett v. Charlson, 18 Md. App. 80, 305 A.2d 166 (1973) (same); Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973) (same). Although the parent would normally have the shorter life expectancy, a child who was already seriously ill at the time of the injury, for example, might have a shorter life expectancy than the parent.

198 *See* text accompanying notes 184-90 *supra*.

199 By analogy, in those jurisdictions that restrict wrongful death damages to pecuniary losses, some courts have held that the parent of a deceased child is entitled to recover damages only for the period of the child's minority had the child lived. *E.g.*, Clevenger v. Kern, 100 Ind. App. 731, 197 N.E. 731 (1935); Frantz v. Gower, 119 Pa. Super. 156, 180 A. 716 (1935). *See also* Annot., 14 A.L.R.2d 485, 509-10 (1950).

200 *See* notes 167 & 171-72 *supra* & text accompanying.

It has arisen in other contexts, including wrongful death actions brought by multiple survivors and actions for lost services brought by both parents. A survey of these two types of cases reveals that there are numerous alternative solutions. One is to award a lump sum to the joint plaintiffs and permit them to divide it as they see fit.[201] Such an arrangement is satisfactory as long as all the parties are on speaking terms and have an equal voice in the apportionment process. In contrary circumstances, however, this method of apportionment does not offer satisfactory protection.[202] A better solution might be to allow the plaintiffs to request a lump sum, but to provide for judicial apportionment of the damages in the event that the plaintiffs do not make such a request.[203] The simplest method of apportionment would be on a pro rata basis.[204] More difficult, but perhaps more equitable, would be an apportionment by the court or jury on a percentage basis in proportion to the value of the society and companionship that each plaintiff lost.[205] This method would create serious problems of proof, since the loss is an intangible one. It would also tend to destroy harmonious family relations. However, it would take account of situations in which one plaintiff is significantly closer to the injured person than another. To

201 *E.g.*, Meissner v. Smith, 94 Idaho 563, 494 P.2d 567 (1972) (plaintiff-parents awarded lump sum in action for death of their child); Vande Hei v. Vande Hei, 40 Wis. 2d 57, 161 N.W.2d 379 (1968) (plaintiff-parents awarded lump sums for lost services and for lost society and companionship in action for death of their child).

202 *E.g.*, WASH. REV. CODE ANN. § 4.24.010 (Supp. 1974) (plaintiff-parents awarded lump sum in action for injury or death of child unless divorced or separated, in which case "damages may be awarded to each plaintiff separately, as the court finds just and equitable").

203 *E.g.*, OHIO CODE ANN. § 2125.03 (Supp. 1975) (wrongful death statute providing that, unless beneficiaries adjust damages among themselves, court shall apportion damages equitably); S.D. COMPILED LAWS ANN. § 21-5-8 (1967) (same). *See also* ORE. REV. STAT. § 30.050 (1974) (wrongful death statute providing that, unless beneficiaries otherwise agree, probate court will apportion damages for pecuniary and nonpecuniary losses to decedent's spouse, children and parents).

204 *E.g.*, MISS. CODE ANN. § 11-7-13 (1972) (wrongful death statute); MO. CODE ANN. § 537.080(2) (Supp. 1975) (wrongful death statute governing allocation of damages between parents who bring joint action); Wright v. Standard Oil Co., 470 F.2d 1280 (5th Cir. 1972) (applying Mississippi law) (equal allocation of damages between plaintiff-parents in action for lost services).

205 *E.g.*, ARIZ. REV. STAT. § 12-612 (c) (Supp. 1975) (wrongful death statute distributing proceeds to beneficiaries "in proportion to their damages") (apportionment by court); CAL. CIV. PRO. CODE § 377 (West 1973) (wrongful death statute awarding "such damages . . . as . . . may be just") (apportionment by court); Yordon v. Savage, 279 So. 2d 844, 847 (Fla. 1973) (action for lost services, society and companionship; apportionment of proceeds "to one or both parents as may seem just, based upon the social and economic relationships of the parties to the children") (apportionment by jury or, where waived, by the court); Liebler v. Our Lady of Victory Hosp., 43 App. Div. 2d 898, 351 N.Y.S.2d 480 (1974) (action for lost services; equitable allocation of damages between parents during course of the trial); ORE. REV. STAT. § 30.050 (1974) (wrongful death statute apportioning damages to decedent's spouse, children and parents "in accordance with the beneficiary's loss") (apportionment by probate court); S.D. COMPILED LAWS ANN. § 21-5-8 (1967) (wrongful death statute appor-

preserve family harmony without sacrificing the equitable features of this method of apportionment, it would be possible to provide for a pro rata allocation among plaintiffs who live together, and a percentage allocation as to those plaintiffs who are no longer residing under the same roof. In short, while it may be difficult, it will not be impossible to solve the problem of allocating damages for lost society and companionship among multiple plaintiffs.

E. *Eliminating Double Recovery*

Many courts have expressed a fear that recognition of the action for lost society and companionship would lead to double recovery in the actions by the injured party and the secondary tort victim. There are several ways to avert this potential danger. The least drastic measure would be to instruct the jury that the primary tort victim is entitled to recover solely for his or her personal injuries, including damages for pain and suffering, and that the secondary tort victim is entitled to recover solely for loss of the injured person's society and companionship.[206] This type of an instruction would clearly describe and distinguish the different elements of compensable damage in the two causes of action. To fetter a potentially capricious jury, the trial judge could make use of special verdicts or interrogatories, compelling the jury to designate the amount of damages awarded to the primary and secondary tort victims.[207] And if the primary and secondary tort victims' actions were pending simultaneously, they could be consolidated for purposes of trial.[208] However, the only way to eliminate the danger

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tioning damages "in such manner as shall be fair and equitable") (apportionment by court); VA. CODE ANN. § 8-636.1 (Supp. 1974) (wrongful death statute providing that jury "may direct in what proportion [damages] shall be distributed"); WYO. STAT. ANN. § 1-1066 (Supp. 1975) (wrongful death statute providing that "court or jury may award . . . that amount of damages to which it considers [each] person entitled").

If the parties settle the case prior to trial, but cannot agree upon an equitable apportionment of damages, the apportionment could be made by a court. *E.g.*, ORE. REV. STAT. § 30.040 (1974).

206 *E.g.*, Swartz v. United States Steel Corp., 293 Ala. 439, 445-46, 304 So. 2d 881, 886 (1974); Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 406 & n.23, 525 P.2d 669, 685 & n.23, 115 Cal. Rptr. 765, 781 & n.23 (1974) (collecting cases from other jurisdictions). *But see* Take v. Orth, 395 S.W.2d 270 (Mo. App. 1965) (jury may be instructed to take into consideration wife's pain and suffering for purposes of determining extent of husband's loss of consortium).

207 *E.g.*, Swartz v. United States Steel Corp., 293 Ala. 439, 446, 304 So. 2d 881, 887 (1974) (concurring opinion); Thill v. Modern Erecting Co., 284 Minn. 508, 513 & n.8, 170 N.W.2d 865, 869 & n.8 (1969).

208 *E.g.*, Diaz v. Eli Lilly & Co., 364 Mass. 153, 162, 302 N.E.2d 555, 560-61 (1973); Millington v. Southeastern Elev. Co., 22 N.Y.2d 498, 502, 239 N.E.2d 897, 899, 293 N.Y.S.2d 305, 307-08 (1968). *See generally* FED. R. CIV. PRO. 42.

of double recovery altogether would be to require joinder of the primary and secondary tort victims' claims.[209]

The joinder requirement could be made absolute, thereby barring a secondary tort victim from recovery unless the action for lost society and companionship were joined with the primary tort victim's action for personal injuries.[210] Such a requirement would preclude any possibility of double recovery, as the same jury would always assess both the primary and secondary tort victims' damages. But it has been termed "too Draconian"[211] because it would bar recovery by a secondary tort victim who is unable to join the primary tort victim for reasons beyond his or her control. Such a situation will arise if the primary tort victim refuses to sue or if the statute of limitations has run on the primary (but not the secondary) tort victim's claim.[212]

A less drastic alternative would be to require joinder of the primary and secondary tort victims whenever feasible, putting the burden on the defendant to request joinder if the secondary tort victim fails to comply with the requirement.[213] This procedure would be advantageous because it would not bar a meritorious claim solely due to the plaintiff's inability to join with the primary tort victim's claim. The procedure has been criticized, however, for placing the burden of requesting joinder on the wrong party.[214]

In short, the danger of double recovery can be eliminated with varying degrees of certainty by means of jury instructions, special verdicts or interrogatories to the jury, consolidation, or joinder. The pro-

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209 *E.g.*, Shockley v. Prier, 66 Wis. 2d 394, 404, 225 N.W.2d 495, 501 (1975). *See generally* FED. R. CIV. PRO. 19.

210 *E.g.*, Deems v. Western Md. Ry., 247 Md. 95, 231 A.2d 514 (1967); Thill v. Modern Erecting Co., 284 Minn. 508, 170 N.W.2d 865 (1969); General Elec. Co. v. Bush, 88 Nev. 360, 498 P.2d 366 (1972); Ekalo v. Constructive Serv. Corp. of Am., 46 N.J. 82, 215 A.2d 1 (1965).

211 Diaz v. Eli Lilly & Co., 364 Mass. 153, 163, 302 N.E.2d 555, 561 n.30 (1973). At first, Wisconsin had an absolute joinder requirement. Moran v. Quality Alum. Casting Co., 34 Wis. 2d 542, 150 N.W.2d 137 (1967). Now it requires joinder only when it is feasible. Fitzgerald v. Meissner & Hicks, Inc., 38 Wis. 2d 571, 157 N.W.2d 595 (1968).

212 Fitzgerald v. Meissner & Hicks, Inc., 38 Wis. 2d 571, 580-81, 157 N.W.2d 595, 599-600 (1968).

213 *E.g.*, Swartz v. United States Steel Corp., 293 Ala. 439, 304 So. 2d 881 (1974); Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974); Gates v. Foley, 247 So. 2d 40 (Fla. 1971); Kotsiris v. Ling, 451 S.W.2d 411 (Ky. 1970); Diaz v. Eli Lilly & Co., 364 Mass. 153, 302 N.E.2d 555 (1973); Cline v. Carthage Crushed Limestone Co., 504 S.W.2d 118 (Mo. 1974); Fitzgerald v. Meissner & Hicks, Inc., 38 Wis. 2d 571, 159 N.W.2d 595 (1968). *See generally* 3A J. MOORE, FEDERAL PRACTICE ¶ 19.19 at 2585-87 (2d ed. 1974).

214 Hair v. County of Monterey, 45 Cal. App. 3d 538, 548, 119 Cal. Rptr. 639, 645 (1975) (concurring opinion).

cedure selected will depend upon the extent to which the court perceives the danger of double recovery to be a problem.[215]

F. *Derivative vs. Independent Action*

What must the plaintiff prove in order to establish a prima facie case for lost society and companionship? And what defenses can be asserted to defeat (or diminish) the plaintiff's recovery? The answers to these questions hinge upon the resolution of a broader issue: Is the action for lost society and companionship a derivative or an independent cause of action? So far, no court has addressed this issue in the context of an action for lost society and companionship, but judicial opinions in actions for the loss of a spouse's consortium and for the loss of a child's services (analogous actions by secondary tort victims) suggest that most courts would characterize the action for lost society and companionship as a derivative action.[216]

With respect to the plaintiff's prima facie case, if the lost society and companionship action is characterized as "derivative," the secondary tort victim will have to prove the commission of a tortious act causing physical harm to the injured person.[217] Regarding the defenses, the secondary tort victim's action will be barred (or the amount of damages reduced) by any defenses available against the primary tort victim, including assumption of risk,[218] contributory negligence,[219] and the operation of a guest statute,[220] workers' compensation statute,[221] or

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[215] *See* text accompanying notes 77-81 *supra*.

[216] For a general discussion of the nature of a derivative action, *see* W. PROSSER, *supra* note 3, at § 125, at 891-94. Wrongful death actions, which are also brought by secondary tort victims, will not be cited by way of analogy in this section because the language of the statute normally determines whether they are derivative or independent. *See generally* S. SPEISER, *supra* note 24, at §§ 5.1-5.25, 11.5-11.27.

[217] *E.g.*, Smith v. Tri-State Culvert Mfg. Co., 126 Ga. App. 508, 191 S.E.2d (1972); Utecht v. Steinagel, 54 Wis. 2d 507, 196 N.W.2d 674 (1972).

[218] *E.g.*, Barash v. KLM Royal Dutch Airlines, 315 F. Supp. 389 (E.D.N.Y. 1970); RESTATEMENT OF TORTS § 703, Comment *a* (1938).

[219] *E.g.*, Chicago, B. & Q. R.R. v. Honey, 63 F. 39 (8th Cir. 1894); Nelson v. Busby, 246 Ark. 237, 437 S.W.2d 799 (1969) (comparative negligence); Gayhart v. Schwabe, 80 Idaho 354, 330 P.2d 327 (1958); Brown v. Stertz, 237 Ind. 497, 147 N.E.2d 239 (1958); Thibeault v. Poole, 283 Mass. 480, 186 N.E. 632 (1933); Tidd v. Skinner, 225 N.Y. 422, 122 N.E. 247 (1919); White v. Lunder, 66 Wis. 2d 563, 225 N.W.2d 442 (1975) (comparative negligence); Callies v. Reliance Laundry Co., 188 Wis. 376, 206 N.W. 198 (1925); RESTATEMENT (SECOND) OF TORTS § 693, Comment *c* (Tent. Draft No. 14, 1969); RESTATEMENT OF TORTS § 703, Comment *a* (1938); Annot. 21 A.L.R.3d 469 (1968); Annot., 42 A.L.R. 717 (1926). It may, of course, be difficult or impossible to establish that an injured child was contributorily negligent, particularly if the child is very young. *E.g.*, Holmes v. Missouri Pac. Ry., 207 Mo. 149, 105 S.W. 624 (1907). *See generally* W. PROSSER, *supra* note 3, at § 65, at 419.

[220] *E.g.*, Shiels v. Audette, 19 Conn. 75, 174 A. 323 (1934); Schlitz v. Meyer, 32 Ohio App. 2d 221, 289 N.E.2d 587 (1971); Arritt v. Fisher, 286 Mich. 419, 282 N.W. 200 (1938);

statute of limitations.[222] If both actions are tried to the same jury, the jury will not be permitted to return irreconcilably inconsistent verdicts.[223]

Although a derivative action is thus dependent on the primary tort victim's claim, it does have certain qualities of separateness and independence. For example, the secondary tort victim must prove that he or she sustained actual harm,[224] and the claim is barred (or the recovery reduced) by his or her assumption of risk[225] or contributory negligence.[226] While the defenses to a primary tort victim's action normally

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Hall v. Royce, 109 Vt. 99, 192 A. 193 (1937). *Contra* Irlbeck v. Pomeroy, 210 N.W.2d 831 (Iowa 1973).

221 *E.g.*, Smither & Co. v. Coles, 242 F.2d 220 (D.C. Cir.), *cert. denied*, 354 U.S. 914 (1957); Wright v. Action Vending Co., 544 P.2d 82 (Alas. 1975); Moran v. Nafi Corp., 370 Mich. 536, 122 N.W.2d 800 (1963). *Contra* Johnson v. Lohre, 508 S.W.2d 785 (Ky. 1974); LaBonte v. National Gypsum Co., 110 N.H. 314, 269 A.2d 634 (1970). *See generally* 2 A. LARSON, WORKMEN'S COMPENSATION LAW § 66.00-.20 (1975).

It is not yet clear how no-fault legislation will affect suits by secondary tort victims. Current case law suggests that the courts will not construe no-fault legislation to abolish such actions, but will allow recovery only if the primary tort victim meets the statutory threshold requirements. Faulkner v. Allstate Ins. Co., 45 U.S.L.W. 2030 (Fla. App. June 16, 1976); Marquez v. Mederos, 307 So. 2d 873 (Fla. App. 1975); Barker v. Scott, 81 Misc. 2d 414, 365 N.Y.S.2d 756 (Sup. Ct. 1975).

222 Tollett v. Mashburn, 291 F.2d 89 (8th Cir. 1961) (applying Arkansas law); Rex v. Hutner, 26 N.J. 489, 140 A.2d 753 (1958); Desjourdy v. Mesrobian, 52 R.I. 146, 158 A. 719 (1932). *Contra* Mitchell v. White Motor Co., 58 Ill. 2d 159, 317 N.E.2d 505 (1974). *See generally* Comment, *Loss of Consortium: The Applicable Statute of Limitations*, 47 VA. L. REV. 1414 (1961); Annot., 108 A.L.R. 525 (1937).

223 When the jury returns a verdict against the primary tort victim, but for the secondary tort victim, the courts generally order a new trial of both causes of action. *E.g.*, Smith v. Richardson, 277 Ala. 389, 171 So. 2d 96 (1965); White v. Hammond, 129 Ga. App. 408, 199 S.E.2d 809 (1973); Bias v. Ausbury, 369 Mich. 378, 120 N.W.2d 233 (1963) (new trial on issue of damages only); Thompson v. Iannuzi, 403 Pa. 329, 169 A.2d 777 (1961); Dudley v. Phillips, 218 Tenn. 648, 405 S.W.2d 468 (1966); Norfolk So. Ry. v. Fincham, 213 Va. 122, 189 S.E.2d 380 (1972); Utecht v. Steinagel, 54 Wis. 2d 507, 196 N.W.2d 674 (1972). When the jury returns a verdict for the primary tort victim, but against the secondary tort victim, the courts order a new trial of both causes of action unless they can reconcile the two verdicts, as when only the secondary tort victim was contributorily negligent. *E.g.*, Smith v. Tri-State Culvert Mfg. Co., 126 Ga. App. 508, 191 S.E.2d 92 (1972); Hilla v. Gross, 43 Mich. App. 648, 204 N.W.2d 712 (1972) (when secondary tort victim failed to prove that she suffered any damage, verdicts not inconsistent); Moore v. Parks, 458 S.W.2d 344 (Mo. 1970) (when secondary tort victim was contributorily negligent, verdicts not inconsistent); Manley v. Horton, 414 S.W.2d 254 (Mo. 1967). Both the primary and secondary tort victims must appeal in order to have inconsistent verdicts set aside. McGilvray v. Powell 700 North, Inc., 86 F.2d 909 (7th Cir. 1951).

224 *E.g.*, Welsh v. Fowler, 124 Ga. App. 369, 183 S.E.2d 574 (1971); Robben v. Peters, 427 S.W.2d 753 (Mo. App. 1968). As a general rule, the secondary tort victim is entitled to recover compensatory damages only; punitive damages go to the primary tort victim. Annot., 25 A.L.R.3d 1416 (1969).

225 *E.g.*, Winterstein v. Wilcom, 16 Md. App. 130, 293 A.2d 821 (1972); RESTATEMENT (SECOND) OF TORTS § 694A (Tent. Draft No. 14, 1969).

226 *E.g.*, Pratt Coal & Iron Co. v. Brawley, 83 Ala. 371, 3 So. 555 (1888); Moore v. Parks, 458 S.W.2d 344 (Mo. 1970); Patusco v. Prince Macaroni, Inc., 50 N.J. 365, 235 A.2d 465 (1967) (dictum) (court held that husband's contributory negligence did not bar his action for wife's medical expenses, but distinguished action for loss of consortium); Marton v. McCasland, 16 App. Div. 2d 781, 228 N.Y.S.2d 756 (1962); Gustin v. Meadows, 521 P.2d

bar the secondary tort victim's claim, this is not true with respect to intrafamily immunities.[227] Nor are secondary tort victims affected by the settlement of the primary tort victim's claim.[228] A judgment in the injured person's case may not operate as res judicata or collateral estoppel in a subsequent action by the secondary tort victim.[229] And when the two actions are tried before two different juries, inconsistent verdicts will be upheld.[230] As a result, some courts have found themselves describing a secondary tort victim's action as "derivative, but independent."[231] This label is probably more accurate, yet it also emphasizes the inconsistencies in the law governing actions by secondary tort victims.

Although most jurisdictions that recognize an action for lost society and companionship will probably consider it "derivative" and apply the rules developed in actions for loss of consortium and loss of services, pioneering courts might want to take this opportunity to eliminate the inconsistencies in the law. They could characterize the claim for lost society and companionship as an independent action based upon an injury to the primary tort victim.[232] The secondary tort victim would have to prove the commission of a prima facie tortious act by the defendant causing harm to the primary tort victim.[233] In that sense, the action would be "dependent." In all other respects, however,

429 (Okla. App. 1974); White v. Lunder, 66 Wis. 2d 563, 225 N.W.2d 442 (1975) (comparative negligence); RESTATEMENT (SECOND) OF TORTS § 694A (Tent. Draft No. 14, 1969).

227 For example, it is uniformly held that the parents of an unmarried child may sue the tortfeasor for loss of services even though their child has subsequently married the tortfeasor. *E.g.*, Hudson v. Hudson, 226 Md. 521, 174 A.2d 339 (1961); Orr v. Orr, 36 N.J. 236, 176 A.2d 241 (1961); Trotti v. Piacente, 99 R.I. 167, 206 A.2d 462 (1965); Annot., 91 A.L.R.2d 910 (1963). For a general discussion of intra-family immunities, see W. PROSSER, *supra* note 3, at § 122.

228 *E.g.*, Crouch v. West, 29 Colo. App. 72, 477 P.2d 805 (1970); Kotsiris v. Ling, 451 S.W.2d 411 (Ky. 1970); LaBonte v. National Gypsum Co., 110 N.H. 314, 269 A.2d 634 (1970); RESTATEMENT OF TORTS § 703, Comment *b* (1938).

229 In actions for lost services, the courts have uniformly held that a judgment in the primary tort victim's case is not res judicata or collateral estoppel in the secondary tort victim's action. *E.g.*, Youngblood v. Taylor, 89 So. 2d 503 (Fla. 1956); Gumienny v. Hess, 285 Mich. 411, 280 N.W. 809 (1938); Kleibor v. Rogers, 265 N.C. 304, 144 S.E.2d 27 (1965); Whitehead v. General Telephone Co., 20 Ohio St. 2d 108, 254 N.E.2d 10, 49 Ohio Ops. 2d 435 (1969); RESTATEMENT OF TORTS § 703, Comment *b* (1938). This is also the majority rule in actions for loss of consortium, although there are a few decisions to the contrary. Annot., 12 A.L.R.3d 933 (1967).

230 *See* Dudley v. Phillips, 218 Tenn. 648, 405 S.W.2d 468 (1966).

231 *E.g.*, Sove v. Smith, 355 F.2d 264, 267 (6th Cir. 1966); Monk v. Ramsey, 223 Tenn. 247, 443 S.W.2d 653 (1969).

232 *See* Schwartz v. City of Milwaukee, 54 Wis. 2d 286, 293, 195 N.W.2d 480, 484 (1972). The Wisconsin court later reverted to its original terminology, characterizing the action for loss of consortium as a "derivative" claim. White v. Lunder, 66 Wis. 2d 563, 574, 225 N.W.2d 442, 449 (1975).

233 *See* Schwartz v. City of Milwaukee, 54 Wis. 2d 286, 293, 195 N.W.2d 480, 484 (1972).

it would be "independent." Specifically, the secondary tort victim would have to prove that he or she sustained actual harm[234] and the claim would be subject to any defenses assertable against him or her, such as assumption of risk[235] or contributory negligence.[236] However, absent specific legislation to the contrary, the secondary tort victim would not be barred by the defenses available against the primary tort victim. Thus the primary tort victim's assumption of risk and contributory negligence would not bar the secondary tort victim's recovery.[237] As under present

[234] *See* note 223 *supra* & text accompanying.

[235] *See* note 224 *supra* & text accompanying.

[236] *See* note 225 *supra* & text accompanying. If two or more plaintiffs are joined in an action for lost society and companionship, the contributory fault of one plaintiff should merely bar or reduce his or her recovery, and should not affect the right of the other plaintiffs to recover. *E.g.*, Wright v. Standard Oil Co., 470 F.2d 1280 (5th Cir.), *cert. denied*, 412 U.S. 938 (1973) (applying Mississippi law) (comparative negligence); Ward v. Buskin, 94 So. 2d 859 (Fla. 1957); Acevedo v. Acosta, 296 So. 2d 526 (Fla. App. 1974) (comparative negligence); Zach v. Morningstar, 258 Iowa 1365, 142 N.W.2d 440 (1966); Idzojtic v. Catalucci, 222 Pa. Super. 47, A.2d 464 (1972). Even in community property jurisdictions, the trend is away from imputing the contributory negligence of one spouse to the other. Comment, *Husband and Wife Are Not One: The Marital Relationship in Tort Law*, 43 U.M.K.C. L. REV. 334, 341-46 (1975).

[237] Handeland v. Brown, 216 N.W.2d 574 (Iowa 1974). *Handeland* is the only case rejecting the well-established rule that a secondary tort victim's claim is barred by a primary tort victim's contributory negligence. Nevertheless, the general rule has been subjected to devastating criticism. *E.g.*, Ross v. Cuthbert, 293 Ore. 429, 439, 397 P.2d 529, 533 (1964) (dissenting opinion); 1F. HARPER & F. JAMES, *supra* note 18 ,at § 8.8, at 632-34, § 8.9, at 640; 2F. HARPER & F. JAMES, JR., THE LAW OF TORTS § 23.8 (1956); W. PROSSER, *supra* note 3, at § 125, at 892-93; Gregory, *The Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services*, 2 U. CHI. L. REV. 173 (1935); James, *Imputed Contributory Negligence*, 14 LA. L. REV. 340 (1954); Annot., 21 A.L.R.3d 469, § 3 (1968). It is difficult to predict whether other jurisdictions will follow *Handeland*, particularly since the trend toward comparative negligence has ameliorated the harshness of the rule imputing the contributory negligence of the primary tort victim to the secondary tort victim. *See* cases cited note 218 *supra*.

The dissenters in *Handeland* observed that the rule set forth in the majority's opinion would operate fairly only if the third-party tortfeasor were given contribution rights against the negligent, primary tort victim. 216 N.W.2d 574, 579-80 (Iowa 1974). Otherwise, the third-party tortfeasor would pay for the secondary tort victim's entire loss, including that portion attributable to the primary tort victim's negligence. However, Iowa's "common liability" and "family immunity" doctrines bar a third-party tortfeasor from bringing an action for contribution against the primary tort victim. *Id.* at 579. In other jurisdictions, the issue remains unresolved. At first glance, it may seem bizarre to say that the primary tort victim must pay for a portion of the secondary tort victim's loss of the primary tort victim's society and companionship. *Id.* at 579-80. *See also* Plain v. Plain, —— Minn. ——, 240 N.W.2d 330 (1976) (husband and children not allowed to recover for either loss of consortium or society and companionship from wife and mother who negligently injured herself). However, if the action for lost society and companionship is truly independent, apportionment of the loss between the third-party tortfeasor and the negligent, primary tort victim seems reasonable. If contribution is allowed, however, practical problems will arise. Since the primary and secondary tort victims will normally be part of a single economic unit, payment of contribution by the primary tort victim will often have the ultimate effect of diminishing the secondary tort victim's recovery, unless the primary tort victim is insured. Furthermore, when the primary tort victim is uninsured, the secondary tort victim may be reluctant to sue the third-party tortfeasor due to the primary tort victim's vulnerability to a suit for contribution. These practical problems point to a more philosophical issue: Should a third-party tortfeasor who is a superior

law, judicially-created immunities preventing the primary tort victim from bringing suit,[238] or the settlement of the primary tort victim's claim,[239] would not affect the secondary tort victim's action. And such legislation as guest statutes,[240] workers' compensation statutes,[241] or tort claims acts[242] would not preclude the secondary tort victim's recovery in the absence of a discernible legislative intent.[243]

Even though the action for lost society and companionship would be "independent," joinder with the primary tort victim's claim should be required whenever feasible.[244] Such a requirement would largely eliminate the problems of res judicata and collateral estoppel.[245] In the event of joinder, the return of irreconcilably inconsistent verdicts would be grounds for a new trial, but verdicts could be reconciled more readily than under present law, since the defenses assertable against the primary tort victim would no longer directly affect the secondary tort victim's claim.[246] To promote joinder, the statute of limitations should be the same for both the primary and secondary tort victims. One of the two victims will always be a child, however, and many jurisdictions have legislation tolling the statute of limitations during minority which would allow the child to sue after the statute of limitations had run on the parent's action.[247] This roadblock to joinder could be removed only by the enactment of legislation creating a uniform statute of limitations for both the primary tort victim's action for personal injuries and

loss bearer be allowed to shift the loss to a primary tort victim when the latter is an inferior loss bearer? Similar concerns recently prompted the New York Court of Appeals to hold that the defendant in an action by a child for personal injuries cannot bring a contribution action against the parents for negligent supervision of the injured child. Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974).

238 *See* note 226 *supra* & text accompanying.

239 *See* note 227 *supra* & text accompanying.

240 *E.g.*, Irlbeck v. Pomeroy, 210 N.W.2d 831 (Iowa 1973).

241 *E.g.*, Johnson v. Lohre, 508 S.W.2d 785 (Ky. 1974); La Bonte v. National Gypsum Co., 110 N.H. 314, 269 A.2d 634 (1970).

242 *E.g.*, Schwartz v. City of Milwaukee, 54 Wis. 2d 286, 195 N.W.2d 480 (1972).

243 *See* cases cited notes 219-20 *supra*.

244 *See* notes 212-13 *supra* & text accompanying.

245 *See* note 228 *supra* & text accompanying. If the two actions are not joined, a convincing argument can be made that collateral estoppel should preclude relitigation of the issues which the primary and secondary tort victims' claims have in common. *E.g.*, Thill v. Modern Erecting Co., 284 Minn. 508, 170 N.W.2d 865 (1969).

246 *See* note 222 *supra* & text accompanying. If the two actions are not joined, inconsistent verdicts would be permissible. *See* note 229 *supra* & text accompanying.

247 For a listing of the jurisdictions that suspend the statute of limitations during the period of a child's minority, see 4 AM. JUR. TRIALS 602-03 (1965). Since the tolling is exclusively for the benefit of minors, it does not apply, for example, to a parent's action for lost services. *E.g.*, Stanczyk v. Keefe, 384 F.2d 707 (7th Cir. 1967) (applying Illinois law); Henry v. Richardson-Merrell, Inc., 366 F. Supp. 1192 (D.N.J. 1973) (applying New Jersey law); Walter v. City of Flint, 40 Mich. App. 613, 199 N.W.2d 264 (1972); Paju v. Ricker, 110 N.H. 310, 266 A.2d 836 (1970); Francis v. County of Westchester, 3 App. Div. 2d 850, 161 N.Y.S.2d 501 (1957).

the secondary tort victim's action for lost society and companionship.[248] Such legislation would of course impose a hardship on minors, but would be necessary to facilitate joinder.

IV. CONCLUSION

Very few jurisdictions permit recovery by a parent, and no jurisdiction allows recovery by a child for lost society and companionship. Yet a tortious interference with the parent-child relationship can cause a genuine loss. Moreover, damages are recoverable for comparable losses in analogous situations. When a tortfeasor causes the total destruction of a parent-child relationship, many jurisdictions allow recovery of wrongful death damages for the loss of the deceased's society and companionship. And in a majority of jurisdictions, damages are awarded for a tortious interference with the husband-wife relationship through an action for loss of consortium. Why, then, have the courts refused to allow recovery for lost society and companionship?

Several courts have justified their denial of recovery on the grounds that there is no judicial precedent for the action and no legal obligation for a parent or child to accord the other society and companionship. But, since there are numerous instances in which compensation is awarded for the loss of an intangible, expectation interest, these are makeweight arguments.

Other courts have been unable to break away from the historical analogy between the parent-child and the master-servant relationships. They have held that only a parent (as master) is entitled to sue for a tortious interference with the parent-child relationship, and that damages are limited to the loss of the child's services. However, such developments as the enactment of child labor laws and child support legislation have diminished the value of a child's services and have placed increased emphasis on the importance of a child's society and companionship.

The remaining objections to creating a new cause of action have superficial appeal, but do not withstand closer analysis. For example, some courts have expressed concern that damages for lost society and

[248] Such legislation could allow a parent to be joined in an action with the minor after the statute of limitations had run on the parent's cause of action. *E.g.*, Matranga v. West End Tile Co., 257 Mass. 194, 257 N.E.2d 433 (1970). More likely, however, such legislation would require the minor to sue within the same period of time as the parent. *E.g.*, Pittman v. United States, 341 F.2d 739 (9th Cir. 1965). The Supreme Court has held that the Constitution "gives to minors no special rights beyond others," and that a state may apply the same statute of limitations to both minors and adults. Vance v. Vance, 108 U.S. 514 (1883).

companionship would be too remote and uncertain. Yet there is considerable precedent for awarding monetary damages as compensation for nonpecuniary losses to secondary tort victims. Moreover, the closeness of the parent-child relationship would ensure the genuineness of the claim, even if the action were extended to adopted, illegitimate, step- or foster children and their parents. Should recognition of the action trigger an undue increase in insurance costs, the legislature could limit the amount of damages recoverable. Any dangers of multiple suits or double recovery could be eliminated by requiring joinder of all potential plaintiffs, as well as of the primary and secondary tort victim's claims, whenever feasible. Damages could be awarded to multiple plaintiffs in a lump sum, unless one or more of them requested judicial apportionment on a pro rata basis or in proportion to the value of the injured person's society and companionship.

In conclusion, the justifications for denying recovery are not particularly convincing. If counsel for the plaintiff were to raise an equal protection challenge, these justifications might not even provide a reasonable basis (under an intermediate standard of review) for the legislative and judicial classifications that allow damages for lost society and companionship when a parent or child is killed or when a spouse is injured, but deny recovery when a parent or child is injured. Given the fundamental importance of the parent-child relationship, the genuineness of the loss sustained, and the administrative feasibility of allowing compensation, the courts ought to depart from the common law prohibition and allow recovery for lost society and companionship.